History of Roman private law ...

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HISTORY

OF :

ROMAN PRIVATE LAW

PART III

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HISTORY

OF '

ROMAN PRIVATE LAW

PART III REGAL PERIOD

BY

E. C. CLARK, LL.D.

EMERITUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF CAMBRIDGE
ALSO OF LINCOLN'S INN, BARBISTER-AT-LAW

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PREFATORY NOTE

THIS volume contains a further portion of the comprehensive History of Roman Law on which the late Professor Clark had been engaged for many years. At the time of his lamented death nearly the whole of the volume was in type, and the manuscript of the rest had been arranged for the printer. Most of the proofs had been corrected, though none had been actually passed for press, and though there may be passages which would have been modified if the author had lived to see the book through the press, no attempt has been made to guess at the changes he might have made.

has been made to guess at the changes he might have made.

Of "editing" there has therefore been no question. The
necessary index and similar matters have been provided: a few misprints and slips of the pen have been corrected, and some readjustment has been made of Section 16 and its Appendices, in which, owing to the fact that this part of the manuscript was sent to press during the last illness of the author, there was some displacement and duplication of matter. Subject to this the text remains as he left it.

This is not the place in which to estimate the late Professor's services to the advancement of learning1: it must

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Biographical notices of the late Professor have appeared in many ournals (e.g. The Times, July 21, 1917; The Yorkshire Post, July 23, 1917), but the best account of his work will be found in an article contributed to the Cambridge Review (Oct. 18, 1917), by an old friend, the present Master of Trinity Hall.

suffice to say that the present volume will, it is hoped, be found to display the solidity and independence of judgment which have characterised all his works. There is a certain fitness in the fact that his last volume contains his matured opinions on the topic which always interested him deeply and formed the subject of his first book, "Early Roman Law," published nearly half a century ago. A considerable amount of matter for the volume on the Republic is in existence, but it is doubtful whether it has reached such a state of preparation as to admit of its being published as a book under his name. Here and there in the present volume references are made to this part of the work: these it has not been thought necessary to modify.

It might have been expected that there would be a section on the times of Tarquinius Superbus. But this revolutionary period can perhaps be most conveniently studied in connexion with the Republican system which it introduced, and it is clear from the scheme outlined at the end of the first volume (Sources, p. 149) that the matters treated in the final pages of the present volume were intended to close a main section of the work.

This volume, like his other works, shews that Professor Clark's intellectual interests were not confined to Roman Law. Much gratitude is due to the Master of Emmanuel, who has been good enough to examine the passages which deal with points of Classical Philology, and to Professor Chadwick, who has rendered the same kindly service in connexion with the passages concerning Germanic Institutions. Some slips of the pen have been in this way corrected, but the views expressed have been in no way modified.

A certain number of references were left blank or incomplete in the proofs. In such circumstances it is not easy to determine the exact intention of the author, so as to be confident that the blanks have been properly filled. Those who have experience in this kind of difficulty will forgive shortcomings in this respect.

The necessary work above mentioned might certainly have been better done but it is offered as a tribute of affectionate respect to the Professor's memory by one who first heard his Professorial Lectures thirty-five years ago and has received nothing but kindnesses from him ever since.

W. W. B.

10 June, 1919.

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§ 1. PRELIMINARY

EARLY Roman Constitutional History, p. 1. Evidence, old terminological, 3. Possible epigraphic, ib. Different treatment of ancient and modern constitutional law, 5. Enquiry limited to Aryan races and primary States, ib. Theoretical origin of States, 7. Individual founders, 8. Romulus and the first three succeeding kings, ib. Real later organisation of preceding elements, 11. Pervading numbers, five, pançagana, geilfine, 13. Decimal factors of a Host, 14. Three, &c., 15. Conclusion. 1. Aggregation as against division, ib. Exception in case of Romulian tribes, 16. 2. Fact or fiction of kinship, ib. Gens result rather than unit of tribe, 17. True ultimate unit, 18.

Early Roman Constitutional History. In the first Part of the present book, the Private Law of Rome (the development of which is the proper subject of the whole work) was seen to be, at least in the earlier times, unavoidably connected with the Constitutional Law and general political history of the same State¹. Accordingly a brief Chronological Sketch was added, based principally upon my own reading of original authorities, from the Pre-republican period to the legislation of Justinian.

To the main features of that Sketch I venture still to adhere, but I must now, after a more careful consideration of recent modern histories, extend the doubtful or hypothetical character, admitted for my own earlier conclusions (ib. pp. 146—8), to a much later period than before, including indeed the whole matter numbered as §§ 25—70. It is, of

¹ Sources Int. pp. 2, 3.

course, very disappointing to be obliged to recognise work, which has taken up some considerable part of one's life, as in great measure thrown away. But I am, in fairness, bound to say that the criticism to which the traditions of this period have been subjected by such as Professor Pais in his Storia d' Italia (Vol. i. Pt 1) and in his Ancient Legends of Roman History leave me no alternative. In particular, I must reluctantly admit that my own previous attempts to reconcile the inconsistencies or contradictions in the received accounts of prime actors in the Regal and Early Republican times can no longer be regarded as successful. These personages must. I think, in their individual character be often abandoned, as historical. Sometimes they are due to the mere romancing of family historians, and based upon or connected with early religious feeling: sometimes they are obvious doublets of later historical characters. former class belong most, if not all, of the legends connecting the early story of Latium with the mythical sequel to the "tale of Troy," of which the Greek origin is obvious. Those which have a more indigenous appearance are mostly traced by Pais and his followers, with very questionable and varying degrees of probability, to personifications of elemental or physiological phaenomena. Into this subject, upon which I look with much suspicion, I do not propose to enter. To a sort of border land, between this and the former class above mentioned, belong the stories of the earlier kings and, to some extent, of the Tarquinii, whom I must persist in regarding as mainly historical. Throughout the later Regal period, at any rate, and the early Republican, there is, to my mind, room for question whether the feigned persons, and their acts, may not represent real stages of national or political developement, which may still be maintained with some reasonable probability against the sweeping negations of Pais.

Much even of the legislation attributed to Romulus, a perfectly fabulous person, may be fairly taken into account, as vouching for the prehistoric antiquity of certain primary constituents of the Roman state, such as familia, gens and curia, upon which a great part of the Personal and Property Law, as well as the Constitutional, of historical Rome may be shewn to depend. The order, too, of this reign and the almost equally apocryphal three which followed it in the story, has, as I shall endeavour to shew, a very probable political significance. These subjects will, however, be more particularly dealt with in the following sections. I confine myself at present to more general questions of early judicature, alleged legislation and legendary foundation, in the Roman and other branches of the great Aryan stock, particularly the Grecian and our own.

The first is a matter of evidence bearing upon the special subject of the present work.

Evidence, old terminological. The view here adopted as to the developement of Private Law, taken in a vague or general sense (Jurisp. ii. p. 435), depends almost entirely, in early times, upon such legal terms and phrases as we rely upon for genuine antiques—either because preserved for the sake of their obsolete form by archaeologians, or persistently referred to the earliest times by jurists and historians. I must of course disregard such obviously manipulated texts as those contained in Cicero's de legibus. On the other hand I regard the metrical character of some of the fragments which have come down to us as internal evidence of antiquity, by their suggestion of an originally oral transmission.

Possible epigraphic. Besides these authorities I have ventured (Sources, p. 14; Jurisp. i. p. 306) to maintain, as not absolutely impossible, the preservation to historical times, in however small amount, of some literary, or rather graphic, record of contemporary practice, surviving from before the

Gallic fire. This is virtually met, I think, with a positive denial by Pais throughout his work: but I would refer specially to the chapter, in his "Ancient Legends," on excavations in the Forum, and more particularly to his discussion of the very remarkable inscribed cippus or stele recently discovered, the date of which he places subsequent to that conflagration. I give briefly some of the reasons why his argument does not appear to me conclusive, premising that I cannot speak from personal inspection of the original, or of the site, which has been excavated subsequently to my last stay in Rome. I must add that I have never considered the inscription to relate to any rex but the rex sacrorum, and that I quote it simply as evidence of the archaic penalty of sacratio having been published in a very early inscribed writing.

The Epigraphy of this inscription may, according to Pais, be referred with equal probability to the sixth, the fifth or the beginning of the fourth century B.C. (Anc. Leg. p. 27). The upshot of his arguments is, however, in favour of the rude forms here preserved belonging (although in a town which had already "received the seeds of culture," to a considerable extent) rather to the later than to the earlier period. I cannot here go into the details which were discussed in my paper previously referred to (Proc. Soc. Ant. xviii. pp. 392-409. See Jurisprudence, i. p. 307): though I may note that many, beside myself, still question the positive assignment of the "Servian" wall (the letters on which were, in that paper, taken into comparison) to the fourth century (Anc. Leg. p. 25). We must, I think, accept the judgement of scientific eyewitnesses that the stele, as discovered, rested upon a stratum later than the Gallic fire: but I cannot see that any of the evidence adduced by Pais precludes the possibility of its being an earlier monument replaced roughly in situ after that catastrophe (see Anc. Leg. pp. 20.31).

Different treatment of ancient and modern constitutional law. Constitutional Law, as treated in the preceding part of this work, has been mostly that of the established and recognised State, having its formulation in historical times, and its practical sanctions in modern. All matters concerning the formation of an old *original* State (as distinguished from ancient or modern copies), have been left over till now; the section on Law and the State being mainly confined to the subjects treated in Austin's 6th Lecture.

To those, indeed, who, like Austin, base all Law upon Ordinance or recognition by a definite governing body, the origin of States is of comparatively little importance. The Sovereign is assumed as existent: from the Sovereign comes the Law, and that is enough. But, as has been previously suggested, historical enquiry seems to shew that Law may exist, and has in fact existed, under forms of human association which fail to satisfy the requisites of a fully formed Political Society, and may precede the Sovereign rather than emanate from him. As between Law and the State the former has possibly, in some cases, been a factor rather than a product of the latter (Jurisprudence, i. p. 82).

The remaining part of the present section is concerned with the *origin*, so far as it may be ascertained or inferred, of the State and Law, in ancient Polities, mainly from that group of cognate races to which Rome belongs (ib. pp. 9, 10).

Enquiry limited to Aryan races and primary States. With regard to the occasional citation of the history and institutions of cognate races, I am disposed to think that the analogies of other Aryan nations, as bearing upon the origin of Law and the State in any particular case, though not direct evidence, amount to rather more than mere illustrations. However separated by lapse of time, local distance, change of climatic conditions, &c., the Indian and

the Teuton have been fairly well proved, by comparative philology, to be descended from the same primitive stock as the Greek and the Roman. Assuming, therefore, this real though remote relationship, about which there is not much question (though there may be about the common original habitat), we may to some extent use what is clear in the early associations, customs or beliefs, of one related race to explain what is obscure or fragmentary in the case of another. It seems going too far, however, to say, as has been suggested, e.g. with regard to Totemism (see Encyc. Brit. s.v.), that what is proved for one Aryan people must be regarded as proved for all.

It may be objected that in limiting the sphere of such comparisons to nations belonging to one particular branch of the human race we are excluding evidence which is held by many observers as of primary importance. It does, however, seem to myself, as it has done to more widely informed observers, that there are peculiarities which distinguish the earliest traceable condition of Aryan races from that of certain others. Whether it be that the latter spring from a different origin, or that we catch our first sight of the former at a later period of developement, we do not, as far as my information goes, find, in the Aryan, evidence of that original proximity to the brute so readily accepted by authors whose maxim appears to be "credo quia detestabile." Moral repulsion is, I admit, no argument in a historical enquiry. Still, even in races among the most degraded existing at the present time, later investigation sometimes shews that the original conclusions of ethnologists-about "group marriage" for instance—may have to be reconsidered and modified2. I should add that where declension, or (not to beg the question) deviation, can be made out, in an

² See for instance Spencer and Gillen's Native tribes of Central Australia, as handled by Miss Simcox in the 19th Century Review of July 1899. See also Miss Bosanquet's The Family, pp. 30, 37.

Aryan race, from the generally higher level, it may be not unreasonably assigned to the admixture of an inferior strain, from a lower human development subordinated but not destroyed. These considerations however belong more properly to the special treatment of the monandrous family as a constituent element in the Roman polity (below, p. 18 and § 2 generally).

The present enquiry is also confined to the cases of the simple primary State and an original foundation. more complicated cases of what has been termed the secondary3 formation of States, various questions arise, turning on, inter alia, external independence as distinguished from Sovereignty proper, with which it is confused by Austin4: questions of undoubted intrinsic importance, even to elementary Jurisprudence, but not falling within the province of the present work. There are also cases of simple States formed in modern times, where the previous history of the component elements accounts perfectly for the phaenomena which we now observe, but at the same time deprives their testimony, analogical or otherwise, of any strictly independent value. I speak, in the present section, of those earlier components which have never formed part of any established State before.

Theoretical origin of States. The Social Compact or Contract is almost entirely a creature of philosophic fiction, to which the origin of States in general was attributed by many writers of the seventeenth and eighteenth centuries—less perhaps as a statement of historical, or presumed historical, fact, than as a protest against other and more obnoxious theories, or as a stalking-horse for political reform. I must refer to Austin and other authorities for the terms of

³ Strictly "Derived." For the more general meaning of the adjective in the text, compare the contents of Bluntschli, Theory of the State, (trans. 1901) Bk iv. chaps. 3 and 4. See also below, p. 9.

⁴ See P. J. p. 173; Jurisprudence, i. p. 152.

this hypothesis, which has now generally given place to the view of Aristotle that man is by Nature a political being, that the State is a result of growth, and sooner or later a necessary condition of human existence⁵. The doctrine that all States continue to exist by an implied contract between the governors and the governed, which is, according to Blackstone⁶, the item of truth contained in the above-mentioned theory, has scarcely reality enough to make the theory worth preserving.

Individual founders. The legendary traditions which pass current for early history deal largely with personal founders of States. Sometimes they are the ancestors of their people, sometimes their chieftains. A large number of these personages present the suspicious characteristic of being synonymous with the actual national name. Hellenes are supposed to be called from their leader Hellen, the Romans, through the name of their city Rome, from Romulus, while Dorus and Ion with many others are the ancestors of the Dorians, Ionians and other similar races. An enquiry into the real meaning of old national names is very interesting, and may, when it reaches any philological certainty, be very useful (see below, § 6, App.). I can merely say that such names are seldom if ever really patronymic or eponymic, and that the individual, with whom they are legendarily connected, is generally a fiction far later than themselves.

Romulus and the first three succeeding kings. This special objection to the individuality of Romulus does not apply equally to such names as those of Numa, Tullus and Ancus, though I am compelled on further investigation to abandon my former suggestion that these were possible chieftains of certain *gentes*⁷ and to consider them as persons,

⁵ P. J. p. 157: Crane and Moses, Politics, p. 68.

⁶ Blackstone, i. pp. 52, 233. Cf. Bluntschli, (trans. 1901) pp. 262, 263, 294 sqg.

⁷ See Sources, p. 46. I may add as to the Hostilii, who only appear

equally fictitious with their predecessor. How far they may represent traditions of early racial or political alternation is considered elsewhere (§ 6, p. 235). As to the last three kings, whatever we may think of their individual stories, particularly that of the semi-real semi-mythical Servius, the historical fact of a Tarquinian, or at least Etruscan, kingdom is generally admitted as concluding a monarchic period⁸.

Neither, of course, does this criticism extend to the individual founders of States by conquest, who are often perfectly real personages. These, however, will often prove to be not originators of constitutional systems or law, but to bring with them their own system developed at home, like some Teutonic conquerors of Britain, or to adopt that of the country conquered, as was done in the main by William the Norman. Therefore, in an enquiry into the ultimate origin of old States, as bearing on that of Law, these cases, though real, are of secondary importance.

I shall shortly have to speak more in detail on the actual institutions which, as distinguished from the legendary sovereigns themselves, may almost certainly be credited with a genuine existence in prehistoric antiquity. Such, in later times, is the genuinely old Salic Law attributed to the typical or eponymous compilers Wisogast, Bodogast, Saligast and Widogast. Roman instances are: the three Tribes with their headmen (tribuni), the curiae and the Curiate Assembly, the Senate, the gens, the patria potestas, the relation of

comparatively late in the Republic (Liv. 27. 35. B.C. 207), that their Ramnian ancestor may owe his existence to the name of an old *curia*, for which Pais finds another and at least a plausible reason (Ancient Legends, p. 33). See however Liv. 1. 30.

⁸ The last point is allowed even by Pais (Ancient Legends, pp. 128, 149), though he gives a different view of the revolution from that ordinarily received; rejecting, of course, the *Regifugium* as anything but a religious ceremony (Ancient Legends, p. 148). Contra see, amongst others, Huschke (das alte Röm. Jahr. pp. 163—165) and below, § 15, pp. 457 sqq.

Hessels and Kern, Lex Salica, col. 561, n. 300.

Patron and Client, all attributed by Livy, Plutarch or Dionysius to the founder of Rome¹⁰. Before, however, I proceed to these details I may refer to a valuable and interesting suggestion of Jhering when speaking of what he terms the cosmogony of Law and the State at Rome¹¹. Recognising the legendary character of the early kings, he regards the legends as a true expression of national sentiment, and in particular the sequence of the reputed institutions as probably indicating a real sequence of principles or formative elements. The stories of Romulus reducing his cave of Adullam into order by institutions mainly connected with the Family, Numa following up with religious ordinances, and the rest, lead him to lay down the following chronological order of principles in the growth of the Roman State. that of subjective right12, or will, in the individual; second a state-forming principle, consisting of family and military institutions; third, religion.

My own attempts to piece together the very fragmentary and questionable evidence as to the earliest history of the Roman State have led me to a conclusion broadly resembling that of Jhering, but different in several important particulars.

The curious dualism which recurs continually down to the reputed beginning of the Republic points to a very early combination of two cognate nationalities. Both appear to have arrived at the paternal family system, but probably in somewhat different degrees of development. In Romulus, the son of the War God, we may discern an invading occupation or settlement under some sort of military organisation, which is, to a certain extent, retained in the dispersal of the tribe over the temporarily subdued country. This occupation

¹⁰ Plutarch, Romulus, capp. 13, 22: Dionysius, 2, passim: Livy distributes the *incunabula* of the Constitution rather more equally between the early kings.

¹¹ Geist, i. pp. 96, 97, 101, 102, 106.

¹² See Jurisprudence, ii. pp. 482, 639.

however evidently results, in course of time, in a comparatively peaceable union with the previous inhabitants, whom I believe to have been on a higher plane, in application of the patriarchal system, than the invaders. Of the possible identification of these two elements with a Patrician and a Plebeian order I shall speak more particularly later on (§ 7). In Numa, the Priest-king, whether he is to be individually regarded as the embodiment of Prophet, Judge or Legislator, we at any rate seem to recognise the first approximation to a settled State, under the connecting link of a common religion and of an administration of justice largely based on religious feeling. This element in the Polity is generally credited to the Sabine stock, the importance of which, as compared with the traditionally prior Roman, Latin or Alban element (see § 6), is repeatedly indicated from the legends of Numa down to the arrival of a practically tribal contingent under the first Claudius, and the rival Sabine Valerii, who play such a conspicuous part in the early Consulships of the Republic¹³. Of a third element I have to speak hereafter (§ 2, p. 42; § 6, p. 237).

Real later organisation of preceding elements. In this substitution of "movements" and "racial instincts" for the action of individual personalities, we may be following a tendency of modern historians too far. Philological criticism appears to me conclusively to dispose of Romulus, apart from the miraculous or supernatural elements in his story: but the question must be asked whether we are equally to abandon the idea of some single mind, or individual legislator. To quote a well-known schoolboy absurdity, may the Iliad and Odyssey be, though not Homer's, the work of "another man of the same name"? Some idea of this kind may have influenced a mind so acute as Niebuhr's, when he adopts the Romulian constitution in Dionysius 2. 7,

¹³ See Liv. 2. 16 and Pais, Storia, i. 1. p. 625, n. 1.

to the extent of actually admitting the gens as an artificial division by that original founder¹⁴.

The reasons which appear to me almost conclusive in favour of Maine's "aggregation" theory 15, as against that of original foundation, in the older Aryan States must be here briefly indicated. For it would certainly seem at first sight that the quasi-chemical combination, in certain numbers, of political units or "equivalents," the formation of larger and yet larger associations, the gradual growth of authorities and shifting of powers, which we shall have to substitute as our working theory, is a very circuitous explanation of simple phaenomena, coming, in probability, far behind the direct Austinian enactments attributed by Roman historians to the Roman kings—the traditional division, for instance, of the Roman people, by its founder, into Tribes, curiae and, according to one account, gentes.

All these are undoubtedly, as the Germans say, uralt. It is the conscious framing and introduction of such multifarious institutions which passes belief. For one thing I would urge what seems to me the entire absence of reasonable motive for such subdivision of territory or power, as distribution over Tribe, curia, Senate and Assembly, on the part of a chieftain, the limits to whose authority were so purely self-imposed and voluntary as they are represented to have been in the case of Romulus¹⁶.

Again, in the intrinsic nature of things, such institutions, if we can call them institutions, as the Parental Power and

¹⁴ Gesch. i. p. 354. Here may be mentioned (though properly the subject of a separate enquiry) Corssen's idea (Aussprache², i. p. 452), maintained on etymological grounds, of the originality of sovereign monarchy, in the main Aryan nationalities, before their separation. All the forms relied on by him seem to me explicable by the idea of judgeship or temporary military command. See § 6, p. 244; § 11, p. 399; § 15, pp. 456 sqq. and App.

¹⁸ E. H. p. 386; and more fully below, § 2, pp. 19, 20.

 $^{^{16}}$ So far as these legends represent the marshalling of a Host, I agree with them ; see below, § 6, pp. 244, 245, &c.

the relation of Patron and Client, must obviously have grown and not been made. In fact, in the passages where Dionysius is speaking of the hero's unwritten laws¹⁷, it does not require a very great change of expression or a very sceptical interpretation to read, for Romulus, ancient custom.

Pervading numbers. Five, pançagana, geilfine. The same objections do not lie to an adaptation and utilisation of pre-existent elements and principles by later governors, even mythical, or rather by the earliest true representatives of those mythical governors, who after all may be typically, if not personally, historical Such an operation, in fact, is expressly stated in the legendary synoecismus of Theseus, presupposing an anterior existence of the Attic Demes, of whose primeval antiquity there are otherwise clear traces.

This artificial element of arrangement may therefore presumably be relied on to some extent as accounting for the *uniform number* in which the lower and intermediate units of prehistoric constitutions are combined ¹⁹ within larger ones, which may be accounted for on other grounds, accidental or historical: e.g. the ten *curiae* in each of the three "Romulian" tribes, &c.²⁰

It will, of course, be preferred by some to refer such phaenomena to a general principle of favourite or pervading numbers which would seem to operate automatically in the early constitutional system of more than one Aryan nation, if not of other stocks. These preferences may not be without their effect even upon the conscious revision or redistribution just suggested, as the possible work of some individual ruler or great man. Of their prior developement, independent of

20 See below, § 6, pp. 245, 247; § 9, p. 313, and Appendix.

¹⁷ Dionysius, 2. 24, 27.

¹⁸ See P. J. p. 280 and Stubbs' C. H. i. p. 109.

 $^{^{19}}$ See § 6, pp. 247, 248, on the suggested revision by the older Tarquin : also § 9, p. 313. As to Theseus see Thucydides, 2. 15: Plutarch, Theseus, 24

any one mind, we have instances, in widely separate nations, some of which may be fairly referred to what I may call natural causes. There is for instance the case of recurrence all over the world of the numbers derived from the hand and the foot—five and ten²¹.

Decimal factors of a Host. An obvious application of the decimal principle, to the elementary drilling of a Host, cannot but command our attention, because occurring at such distances of place and time as between the primordia of Rome and the cradle of our own Teutonic ancestry. A centuriate division of the Roman populus22 has left traces in legend earlier than the elaborate marshalling of the Servian institutions. The English hundred undoubtedly preceded Edgar and Alfred, as the French did Childebert and Clothair. Indeed, when we compare the words of Tacitus in the Germania, it is difficult to avoid the conclusion that the hundred belongs to the immemorial organisation of an invading Host generally. Any individual common founder of the Saxon and Roman century is, of course, out of the question. We may, no doubt, take this remarkable coincidence as the result of an original descent of the migrating races from the same stock. But I would rather attribute these particular numerical arrangements, which seem to be throughout connected with warlike occupation, to the

²¹ Particular instances are: among the natives of India the pançagana or association of five families, the first developement, according to Pictet (Origines, § 304), of the clan and the corresponding village council, which, through the length and breadth of the peninsula, bears a name recording its original constitution of five persons (Maine, V. C. p. 123): among the Irish the strange fine or family, consisting of the fixed number of 17 or 20, with its first constituent the geilfine necessarily of five and five only (Maine, E. H. pp. 220, 221: see however the last article of M'Lennan's Studies). This last depends surely upon the number of the fingers rather than on any metaphorical use of hand (geil), as meaning power—which is Maine's explanation (i.e. pp. 216, 217).

²² See § 5A, pp. 215, 216; § 8, pp. 290, 291.

"natural selection" of convenience and utility. The lower military unit (ten) of an invading host is, to my mind, the only possible explanation of Dionysius' making the Romulian $\delta \epsilon \kappa \acute{a}\varsigma = gens^{23}$.

Three, &c. There are other favourite numbers to be observed in the early history of many nations not capable of so simple an explanation as that above suggested. Three undoubtedly has great claim to be reckoned one of these²⁴, although I have hitherto considered myself justified in attributing its early prevalence at Rome to the accidental or matter of fact addition of a third to two previously united tribes. There are possible arguments, not unconnected, too, with strange Etruscan emblems, for connecting the prevalence of this number also with a natural origin analogous to the hand and foot²⁵, though I myself distinctly prefer the tribal explanation. For other cases, such as that of seven²⁶ and twelve²⁷, I have no suggestion to make.

Conclusion. 1. Aggregation as against division. On the whole, however, I must admit that the recurrence of favourite or "pervading" numbers in the elements of political formation (see below, pp. 22 sq., 196, 313 sqq.) among the three or four particular Aryan Polities of which we know the most, is rather a difficulty, requiring explanation, than an assistance, in arriving at two general results from a comparison of those formative elements, with which I must conclude. These results are based mainly upon the acute observation and brilliant generalisation of Sir Henry Maine, with some modification due to the criticism of M'Lennan and his school

²³ See below, § 5, p. 169; § 6, pp. 244, 248; § 8, p. 285, &c., and Appendix, p. 302.

²⁴ See below, § 9, p. 315.

²⁵ See the coarse plates at the end of Bachofen's Mutterrecht.

²⁶ For instance the Welsh council of elders, Probert, Ancient Laws of Cambria, pp. 45, 61: Lewis, Ancient Laws of Wales, pp. 114, 115, &c.: Seebohm, Tribal System, p. 72: Pictet, § 304.

³⁷ See Bachofen under index reference, Zahlen.

The first is that, in considering many of the bodies as ultimately going to form the historical State, we find coalition rather than division to be the law of original formation. It is, in fact, in the circumstances of such coalition, so far as it can be traced or reasonably inferred, both at Rome and elsewhere, that we can best discern the actual opportunities for crystallising popular or general moral feeling into Law²⁸.

To estimate the traditional phaenomena of the case principally before us, we must therefore reverse the alleged Romulian arrangement, proceeding, in order of original development, from familia and gens to curia, and from curia to populus. The voluntary parcelling out of a populus into curiae (not to mention the difficulty of gens as an artificial creation) is a measure of political decentralisation, which I have noted already as objectless and improbable on the part of any established Headman in a nascent State.

Exception in case of Romulian tribes. With regard, on the other hand, to the three tribes, into which Romulus is stated to have divided his people, the view here accepted goes back to an earlier and non-political state of things, approximating rather to the Horde of M'Lennan than to the Aggregation-tribe of Maine. The coalescence of these three Roman tribes, as entireties, may be, in this view, regarded as historical, though not completed on one occasion. But the individual tribe is not so much to be traced to a coalescence of the smaller elements above-mentioned (except in an embryonic condition) as to the military or predatory assemblage of a Host, under a temporary leader²⁹.

2. Fact or fiction of kinship. The second result of the comparison above referred to is a generalisation which may possibly be extended to almost all associations of human

²⁸ See Jurisprudence, pp. 103, 104, 133—135, &c.

²⁹ This subject, with the probably different degrees of social development in the different Roman tribes, will be more fully considered in § 6. See too Phillpotts' Kindred and Clan, pp. 269, 270.

beings which have formed themselves into States, at least in their earlier stages. This is the prehistoric recognition, certainly among most Aryan nationalities, of groups in which the fact or fiction of kinship is regarded as a principal if not the only connecting link³⁰. There are many different accounts of the long survival of this principle, and different explanations of its ultimate disappearance³¹. Some of the apparently patronymic terms by which the theory was formerly supported are now otherwise explained³²; but, as a general fact, it can scarcely be now contested.

Gens result rather than unit of tribe. The gens is, of course, the well-known instance of this kinship group at Rome. A fuller account of this stage of human association will be attempted in the section (5) especially devoted to this subject: but, in addition to what was said above (p. 16), a few preliminary remarks may be suggested here, as to its institution and its relation to the tribe in the alleged Romulian constitution.

Like the division of a tribe into curiae (see above p. 12), the division of a curia into gentes is primâ facie inconsistent with the conception of an absolute founder, and equally inconsistent with the natural origin, by growth or self-formation, now universally recognised as alone conceivable for the gens: nor is it very clearly attributed to Romulus in the solitary passage on which Niebuhr relies in his general acceptance of an originally artificial division or distribution³³. The word tribus, it may be here premised, has most probably nothing to do with the number three, but means simply clan, belonging to a number of allied words vaguely expressing community of race³⁴. In fact a

²⁰ Maine, A. L. p. 128; E. H. p. 90.

³¹ Phillpotts, pp. 257-265.

²² See inter alia, Freeman, Comparative Politics², p. 263: also Phillpotts, p. 244.

²⁸ See below, § 5, p. 136.

³⁴ See below, § 6, p. 230.

continually recurring duality in early Roman tradition, and, what is more important, in surviving constitutional practice, would seem to indicate rather the original connexion of two cognate associations, at the prehistoric date which we call the foundation of Rome. A third, of a decidedly different sort and breed, was, according to this view, added later.

The tribe itself, at least in the case of the two original Roman ones, cannot, as has been indicated already, be satisfactorily accounted for simply by the previous coalition, assumed, I think, by Maine, certainly by some of his followers, of definite curiae or gentes, although it undoubtedly consisted of units tending to coalesce into such bodies. Many of the phaenomena surviving in the early Roman Constitution, particularly the recurrence of factors and multiples of ten, most probably indicate an original phase, which has much traditional evidence in its favour, of a wave of invaders, in roughly organised military order, possibly of two such waves succeeding one another at a considerable interval (see below, § 6, p. 245, and § 7, p. 255).

True ultimate unit. In the individual constituents of these waves or bands—in other words, the ultimate units of the Roman state—many will be at once disposed to decide on recognising, as against M'Lennan, the Monandrous Family. The controversy, however, between what may be called the Patriarchal and the Antipatriarchal theories, with Maine on the one side, and M'Lennan, Bachofen, &c. on the other, requires to be discussed in a separate section. I can only say here that, as at present advised, I cannot recognise any vestige of true Matriarchy or Polyandry in Roman or any other early history, so far as purely Aryan races are concerned.

§ 2. THE PATRIARCHAL AND ANTI-PATRIARCHAL THEORY

SIR HENRY MAINE, pp. 19-24. M'Lennan's criticism, 24. The Antipatriarchal or Horde theory, ib. Conflicting views of the family, 25. Of coalescence into larger groups, ib. Monandrous family late, Earlier stages and matriarchy, ib. Bachafen's Mutter-Bear rites in Attica, 28. Dargun and Teulon, ib. Partial agreement with Maine as to gens, tribe and family, 29. Examination of Bachofen's cases. Early people of Asia Minor, Lycians, Trojans, ib. Iberians, Basques, Cantabri, 31. Persians, ib. Hibernians and Britons, ib. Greece, early legend, 32. Woman in Homeric and post-Homeric times, 33. Declining deference to, explained, 34. Sparta, ib. Xenophon, ib. Polybius, 35. Locri Epizephyrii, ib. Attica, 36. Clearchus, ib. Teutons, 38. Rome, 39. Germanus, 40. Parricida, ib. Mater Matuta, ib. Story of Cato Minor, 41. Etruscans, 42. Tanaquil, ib. fusion with Sabines, Spurius, 43. Etruscan inscriptions, 44. Praetor's recognition of cognati, ib. Max Müller and Jhering, 45.

Sir Henry Maine's theory. Between the groups, principal and subordinate, of which the early Aryan nations appear generally to have been composed, a certain order of development or coalition has been suggested and surviving instances of each stage pointed out by the above author. His "aggregation" theory is, on the whole, fairly described, by his principal critic M'Lennan¹, as a modification of the old popular belief, as to the genesis of nations, which was really based upon the early scripture history of Israel. For

¹ M'Lennan, P. T. pp. 5, 6, 19, &c.

a considerable time it was accepted as probably near the truth for many, if not most, of the Indo-European races.

According to the theory of Maine the ultimate unit, and the one which forms, to a great extent, a model for the larger successive associations, is the Patriarchal Family, corresponding almost exactly with the ancient Roman familia under the power of its paterfamilias. This is a body of wife—perhaps once wives—children and slaves, under the despotic authority—practically the ownership—of one male head. I would remark, at the outset, that this familia must be admitted to differ in several important respects from the family as described in the book of Genesis².

It is not made very clear whether the next stage is to be considered simply the larger Roman familia including all persons actually related through males, though no longer under the power of one living paterfamilias³, or the gens. The point of difference is that the relationship inter se of the familiae which make up the gens, although effectual to create rights and impose obligations of kinship⁴, was not real, at least not ascertainable, but presumed or fictitious.

With the larger Roman familia or the gens—rather I think with the latter—Sir Henry Maine held that, in past times, the Hellenic $\gamma \acute{e}ros$, the Celtic sept, and the Teutonic kin (maegth) corresponded: in present times, the Joint Undivided Family of the Hindoos and the House Community of Southern Slavonia⁵. As between these two survivals, the Hindoo Family appears rather to consist of actual kinsmen, the House Community to include more artificial relationships.

A different stage in this theory, which has some importance in the attempt to explain Roman Constitutional tradition,

² See below, § 3, pp. 51, 52; § 5, p. 161, &c.

³ See more fully below, § 4, and Maine, E. L. and C. p. 239.

⁴ See below, § 5, pp. 144, 149, 151, &c.

⁵ Maine, E. H. pp. 80, 81: M'Lennan, P. T. pp. 111, 112: see however below, § 5, pp. 162, 170.

is that of the Village Community, mainly now represented in India also⁶. This consists, not of a family, but of an aggregation of families, nominally or theoretically five⁷, with their Council administering or declaring as law simply what always has been. I must add that, although immemorial custom is the thing primarily recognised at present, there are reasons for supposing an earlier religion connected with the customs, which has been superseded while they have been retained⁸. This, however, belongs rather to the question of a general motive to union suggested elsewhere (§ 5, p. 169; § 9, pp. 308, 330), than to the particular Patriarchal Theory.

In the complex structure of these small but very interesting bodies, we also have successive associations of families, the older members taking undoubtedly a higher rank⁹. The modes of speech in use among the subordinate groups fluctuate between language implying a hereditary brotherhood and language implying a voluntary association. The Indian cultivating groups include several families of hereditary traders—the Blacksmith, the Harness-maker, the Shoemaker—who are generally paid by the allotment of a piece of cultivated land in hereditary possession¹⁰. This institution is compared by Sir Henry Maine with the Teutonic Mark as described by Von Maurer¹¹, and is considered to leave traces in certain Townships of England and Burghs of Orkney and Shetland as distinguished from the later Manorial system¹².

See generally Maine, E. H. Lect. 3.

⁷ Pançagana, Maine, V. C. p. 123. See Mill's British India⁵, ii. ch. 5, pp. 217, 218: Pictet, Origines, § 305. Also above § 1, p. 13 and below, § 9, pp. 308, 309.

⁸ Compare however Maine, V. C. p. 68 with E. H. p. 383.

Maine, V. C. pp. 128, 166—168, 176, 177.

¹⁰ ib. pp. 125, 126.

¹¹ ib. ch. 3, specially pp. 77-82.

¹² ib. pp. 10—13 and 85—98. Compare Vinogradoff (Growth of the Manor), Bk 2, ch. 2, § 2, "The Township," with ch. 6, "Manorial origins."

In the Teutonic and English, as in the Indian, groups we find, according to his authorities ¹³, the assignment of a definite lot, in the cultivated area, to particular trades, and, in the principle of hereditary employment, we may have a key to the plentifulness and persistency of names of trades as surnames among ourselves. We may also compare the names of some of the Roman gentes, which more or less certainly denote an occupation or product, coupled with the fact, most probably common to them all, of original joint residence ¹⁴.

The Village Community is regarded by Maine as an ultimate developement out of the Joint Family 15, but one in which the theory of kinship gradually tends to disappear. Land, which was formerly the collective property of the community, is still, as to some part, the subject of collective enjoyment, other parts being periodically distributed and passing ultimately into particular ownership. It is in this stage as we have seen that, in India, the representative Council first appears. It always bears a name recalling its ancient Constitution of five persons 16, but is often narrowed in fact to a single Headman, by whom its customs are interpreted and the disputes of its members settled17. office is sometimes hereditary, but is described as elective. the choice being generally, however, in the last case, confined in practice to the members of a particular family with a strong preference for the eldest male of the kindred, if he be not specially disqualified. This Headman is called the Vicpatis (translated by Curtius, Hausherr, Gemeindehaupt), a name which recurs, with the same sense, in the Lithuanian vészpats. As interpreted by etymologers, this name appears to me to indicate a closer analogy to the Household, and.

¹³ Maine, V. C. pp. 125, 126.

<sup>Below, § 5, pp. 146, 164.
See above, p. 13.</sup>

¹⁶ E. H. p. 78.

¹⁷ V. C. pp. 122, 123.

a more immediate derivation of the Indian Village Community from the Family, than is maintained above by Maine¹⁸.

In the Teutonic counterpart (above, p. 21) no exact parallel to this Council is assigned; though the existence of Village Moots or Assemblies is rather doubtfully suggested by Maine¹⁹. It would certainly seem that the decisions given by the Indian Council had a much wider scope than those of the Village Moot, which appears to have exercised little or no function beyond that of marking out land²⁰. Of anything that can be called general Jurisdiction we can recognise very little, in the Teutonic associations, until we come to the larger Hundred. On such resemblances, however, as may be alleged between the English Village Community, or tun, and the Roman gens or curia, I shall have to speak later on (§ 5, Appendices III and IV).

The next higher aggregation, after the gens, which is recognised by Maine as general²¹, is that of the Tribe, composed of Houses or gentes. There is, to me, some ambiguity in his use of the term Tribe; which, however seems due to the mistranslation of the word Fine in the English Version of the Ancient Laws of Ireland²². That "Tribe," so often referred to in the "Early History of Institutions," is really,

¹⁸ It may be urged, on the other hand, that victuatis is not the same as dámpatis, which does designate literally the Master of the House, while vic, the village, indicates more widely or generally the repair or resort. (Compare Curtius, Gr. Etym. p. 234, \$265 with p. 163, \$95.) But it seems to me that the objection, as an argument, cuts both ways. According to Justi (Curtius, \$95) vic, in Zend, means a community of 15 men and women.

The suggestion, borrowed by Pictet (iii. § 305, pp. 78, 79) from Kuhn, of a connexion between $sabh\acute{a}$, assembly or council, and sibja Gothic (English sib) does not appear to me tenable.

¹⁹ V. C. p. 116: E. L. and C. p. 169.

²⁰ Compare V. C. p. 117 with P. and M. i. p. 19. See however Vinogradoff (Manor), pp. 194—196, 273, 274.

²¹ A. L. p. 128.

²² E. H. p. 8. See also above, § 1, p. 14, n. 21.

according to Maine, the Sept, which corresponds to the Latin gens²³, or rather to what I have here called (§ 4) the Family in the larger sense. The Tribe, properly so called, is, according to Maine, an association of gentes, of which a leading instance is the Romulian tribus. The aggregate of Tribes again forms the People or Commonwealth²¹.

I must admit, in conclusion, that Maine does not anywhere exactly put this down as a general formula for the original creation of the Indo-European State: but the theory seems fairly deducible out of his separate dicts on the subject, and has been so deduced by others than myself.

This generalisation from the M'Lennan's criticism. comparison of early political phaenomena, recommended as it was by the lucid style and apt illustration of its author, will always deserve and command attention. To myself it still appears probable and suggestive, in many points, for many Aryan nationalities, though certainly not proveable for all²⁴. But it has been subjected to so formidable an attack from the late Mr J. F. M'Lennan and his supporters (repeating to some extent the earlier views of Bachofen (below, pp. 27, 28), that it is only due to the student to point out its more questionable positions. Except on the Greek and English parallels to the legal history of Rome, I can give little independent opinion, owing my knowledge mainly to the two disputants. On the excepted cases, I shall have more to say when I come to the detail of gens, curia and tribe $(\S\S 5, 9, 6).$

The Antipatriarchal or Horde theory. A fundamentally different view as to the earlier forms of human association is maintained by M'Lennan, Morgan and others; the particular details somewhat justifying Maine's depreciatory designation of this as the Horde theory.

²³ E. H. p. 105.

²⁴ M'Lennan, Studies, pp. 150, 151, &c.

- 1. As to the family itself. We may begin with what Maine considers the ultimate unit of human society—the Family. Here, any wide or almost universal prevalence of that despotic power, which historically belonged to the Roman paterfamilias, is decidedly questioned, and to a considerable extent successfully disproved, for other races: we must grant that it does appear to be, as alleged by Roman authorities, a special Roman development²⁵.
- 2. As to its coalescence into larger groups. the next place, the combination or coalescence of the larger groups, i.e. of different gentes or stocks, to form a tribe, and of different tribes to form a nation, is held by M'Lennan to be insufficiently evidenced on Maine's theory26, and I must admit that this objection too seems to me to have considerable force. Admitting the general tendency, observed in certain races (see § 1, pp. 13, 14), to crystallise into groups connected by a presumed relationship, I cannot see clear proof of this process being repeated, in ascending degrees, on the same principle. To take the case immediately in point-that of the early Roman Constitution, which is suggested as the probable fact underlying the alleged Romulian subdivisions (see below, § 9, p. 307)—I cannot find that the gentes composing a curia were ever treated, at Rome²⁷. on terms of union by the same tie as the familiae composing a gens; or that the larger association of tribesmen was looked upon as more than very remotely analogous, if at all, to that of gentiles. The evidently late fictions, which we occasionally find, of a common tribal ancestor, are not of sufficient weight

²⁵ M'Lennan, P. T. as quoted below in § 3, pp. 50, 51.

²⁶ M'Lennan, Studies, p. 151.

²⁷ I must admit that the analogy of relationship does seem to be recognised in the Attic $\phi \rho a \tau \rho i a$, which is taken as an exact parallel to curia by the Greek Dionysius. See too §9. As to the relationship, or otherwise, between the individual constituents of tribus and $\phi \nu \lambda \dot{\eta}$, cf. § 6, pp. 230, 245; § 9 p. 315 and App.

to prevail against the more credible hypothesis, as it appears to me, of a primary connexion, dependent, for its raison d'être, upon joint migratory enterprise²⁸ or original home locale.

It is not, therefore, so much on the coalition of the larger groups, which may be due to causes varying for the particular case, as on the relation between the *gens* and the Family, and on the presumed original condition of both, that a comparison is most to be considered between the Patriarchal and the antagonistic theory. And, while admitting that Maine's theory is no longer maintainable as a whole, I hold that, on these points, it does seem more true than that of M'Lennan, &c., for the two or three Aryan races into whose early records and traditions we are able to make any probable investigation.

Monandrous family late. According to this later school the Monandrous Family in general (and à fortiori the Monogynous) is made out to be a comparatively late developement preceded by more or less repulsive forms of recognised promiscuity or community²⁹. Promiscuous relations of the sexes have been sufficiently well established as existing among some races and apparently inferred as universal ^{29a}. A normal ascending order of such pre-monandrous conditions is confidently suggested, in which kinship and descent are represented as originally traced exclusively through women.

Earlier stages and matriarchy. The Social Unit is not according to this theory the Patriarchal Family, but the Tribe or Horde, having subdivisions within which, or within the Tribe if it be small, intermarriage is not permitted. The first beginning of the Family consists in the Maternal head³⁰.

²⁸ See however, § 6, particularly p. 247 and § 9, p. 308 as to the apparently different development of φρατρία and curia.

M'Lennan, Studies, ch. 8.
 ib. p. 87.
 ib. p. 230.

On M'Lennan's three preceding stages—the Nair, the ancient British and the Tibetan—it is sufficient to refer to his Studies³¹.

This order of things is further represented as connected with an original supremacy of women³², specially illustrated by M⁴Lennan from the legends of Greece, by the numerous female goddesses and Eponymae or females who traditionally gave their names to places, and by stray traditions of early female importance in human social life.

These materials come, I think, mainly from a source from which most of the modern reasoning to the above effect, as to Greece and Rome, seems to me to be derived.

Bachofen's Mutterrecht. Bachofen, in his exhaustive and able but extremely fanciful work, das Mutterrecht³³, sets himself to prove, in universal early history, a superior right recognised in, and traced through, the Mother.

M'Lennan treats his early female supremacy as a direct result of Polyandry, which I confess seems to me not only revolting but improbable. Bachofen's rather different view of his "Matriarchy" is to regard it as an upward step from the "natural" condition, for bees, of Queen and Drones—in fact, from absolute promiscuity—to a comparatively high state of civilisation. The prominence of the Mother he makes to be, if I understand his argument aright, not a part of her condition as the wife of many men, but a phase of early religious developement decidedly humanising and beneficial, though replaced, in its turn, particularly at Rome, by the later and more developed Paternal principle 35.

35 ib. pp. 19, 414, 419.

²¹ M'Lennan, Studies, pp. 100, 106, 108, 220. See however below, p. 37.

³² M'Lennan, Studies, pp. 224, 228, 231, &c.

³³ This work appeared in 1861 but has been republished "ganzlich unveränderte" by his widow in 1897.

³⁴ Mutterrecht, pp. 13—15, 19. The connexion of relationship by females with Matriarchy is criticised by Dargun (see below p. 28), p. 1, n. 1.

An interesting instance of Bachofen's treatment of ancient usage and tradition is seen in his separate treatise on the Bear in the religion of antiquity³⁶.

Bear rites in Attica. There were, in Aristophanes' time, very curious Bear rites, connected no doubt with the story of Calisto, in Attica, but apparently having their original home in Arcadia³⁷. These have been also relied on, by modern writers, for a Greek Totemism³⁸. Possibly that theory was not so much to the fore, when Bachofen wrote, as now. Anyhow he does not give the rites in question any such significance, but considers the Bear simply as an emblem of Maternity. I mention this treatise to shew the widely different construction that may be arbitrarily put, not only upon mythological stories, but upon subsisting religious rites. Bachofen's general style of argument is ingenious and, as compared with M'Lennan's, has a more philosophical flavour, but appears to me extremely mystical and insecure. quotations and references, however, are a perfect storehouse on family relationship in the early history of ancient races. His views were generally repeated and emphasised by Dr Lothar Dargun ("Mutterrecht und Raubehe") in 188339.

It is not my business here "tantas componere lites," my only concern strictly being with the traces which the alleged prehistoric conditions may seem to have left upon the early growth of Law at Rome. These, which are very slight and questionable, are given at the end of the present section together with some brief note of Hellenic and Teutonic parallels. I will first make however, for those who wish to

³⁶ Bär in Religion des Alterthums (1863).

³⁷ Schol. Aristoph. Lysistrata 645: Suidas άρκος, άρκτος, ἀρκτεύεσθαι κ.τ.λ. See also Rawlinson, Herodotus³, iii. p. 512, n. 5, p. 533, n. 2.

 $^{^{38}}$ See a few remarks on this subject under the head of gens and tribe, \S 5, App. 11, p. 188.

³⁹ The work of Giraud-Teulon ("Origines de la famille," 1874) I must admit that I know only through its citation in Dargun (p. 4, n. 2 and passim in his Mutterrecht und Raubehe).

follow up the wider subject, some reference to what appear to me the strongest points, in the case made out by Bachofen and those whom I regard as his followers, in respect of early nationalities other than the three above-mentioned (below, pp. 30 sqq.).

Partial agreement with Maine as to gens, tribe and family. On the subject, as a whole, of the Patriarchal as distinguished from the Antipatriarchal theory, I have already remarked upon the somewhat extreme view taken by Maine as to a general prevalence of the Roman patria potestas (see below, § 3, p. 50) and the question whether his system of an ascending series of Coalitions can be maintained as a universal or even a general formula (above, pp. 25, 26). It will be pointed out hereafter (§ 5, p. 171; § 6, p. 244) as probable that the gens is not necessarily a condition precedent to the tribe but perhaps, in some cases, a subsequent developement within it. Both, however, are here assumed to consist. in the nations with which we are concerned, of Monandrous Families. This is the chief point upon which I am thoroughly in agreement with Maine as against M'Lennan. The theory of the latter, as to the Family, and the lower stages of human association, is based mainly upon practices of savage nations observed in recent times, but partly also on early legendary history, or mythology. As to the modern savage, it is unnecessary to insist on the obvious difference of race, from our own Arvan branch, and from the nations of antiquity belonging to the same branch. In the earlier history or quasi-history of the last-mentioned nations there are, it is true, occasional phaenomena to be adduced in support of the revolting stages, which M'Lennan takes to have universally or usually preceded Monandry. But I believe that these can be accounted for either by contact with or tradition from another and a lower breed (below, pp. 30-33). explanation seems to me clearly to meet the Indian cases

collected by M'Lennan⁴⁰. In the purer races of Aryan or Indo-European stock there is strong evidence that, before their separation, the state of Monandry was already attained⁴¹. Nor does the fact of such attainment by these races in general appear to be conclusively disproved by an occasional and exceptional decadence which may be attributed to the influence of neighbouring or even subordinate populations of a lower grade⁴². I shall now, however, proceed to examine the strongest individual cases alleged by Bachofen or M'Lennan, beginning with the outlying or less familiar nationalities⁴³.

Early people of Asia Minor. We may reasonably rank as non-Aryan, or only half Aryan, the Lycians, upon whose being named after the mother, &c. M'Lennan lays great stress⁴⁴. Their difference from the rest of the world in the particular respect above-mentioned is specially noted by Herodotus⁴⁵. If they were an Indo-European immigration, it has been not improbably suggested that they were a very early one remote from that of the Hellenes⁴⁶. Of equally doubtful breed were the more northern peoples on the same west coast of Asia Minor⁴⁷. To some one of these the Trojans must have belonged, so that the peculiar family relationships of Priam's offspring can certainly not be relied on as genuinely Aryan⁴⁸.

40 M'Lennan, Studies, pp. 99, 119, 120.

a See Jhering, Evolution, pp. 39—42: Max Müller, Biographies, Intro. xvii: contra, Dargun, p. 13, on "die Philologen."

⁴² See Maine, V. C. pp. 16, 17; E. L. and C. ch. 7: Clark, P. J. pp. 145, 146: also Girard⁵, p. 148, n. 1.

43 Dargun, p. 17, denies the existence of any such step back.

 44 M'Lennan, Studies, p. 234. As to the Etruscans and their suggested Asiatic descent see below, p. 42 and \S 6, p. 242.

45 Herodotus, 1. 173.
 46 Rawlinson's Herodotus, i. pp. 292, 694.
 47 ib. i. p. 694; iii. p. 530, nn. 2 and 4 citing Lassen: also Herodotus,
 7. 94, 95.

48 M'Lennan, Studies, pp. 221, 222: Bachofen, p. 246*. See Homer, 1l. 2. 867. The *Iberian*, and particularly the *Basque* race, upon whose archaic social principles Bachofen enlarges so much, may be placed in the same category. And in general it must be remarked that the *Mutterrecht* of this author is regarded and distinguished by him as specially "Oriental." The term is vague, but I think that, with him, it implies, if it does not express, non-Hellenic. The "Cantabrian" institutions alleged to be founded on *Mutterrecht* are markedly contrasted with those of the Germans and Romans on the same subject.

The incest attributed to the *Persians* and *Medes*⁵⁰, which is considered by M⁴Lennan as a survival of the polyandric condition into a monandrous stage, must be noted as occurring in undoubtedly Aryan races.

But it is also to be remembered that Herodotus expressly states the practice to be an introduction of Cambyses connected with his expedition into Egypt⁵¹, where such marriages were allowed; and that the Magian religion, which required such unions for the production of its priests, belonged most probably to a non-Aryan race⁵².

With these cases should be considered two pieces of evidence, different in value, as to outlying nations of interest to ourselves, before we come to the subject of Greece proper.

Hibernians and Britons. That Polyandry, which is said to exist at the present day in the grossest form among the Nairs of India, is also attributed by Strabo⁵³ to the Hibernians of his own time. The statement is given, it is

⁴⁹ Bachofen, Mutterrecht, p. 418.

⁵⁰ M'Lennan, Studies, pp. 219, 220.

between near relations, to preserve the purity of the race. The same usage is attributed by Pictet to the "Gaels of Scotland." See next page, and n. 54.

⁵² See Rawlinson, i. pp. 416-419.

⁵³ M'Lennan, Studies, p. 68, n. 2. Strabo, 4. 201, cited in Bachofen p. 198. For other references see Bachofen, l.c.

true, merely on hearsay, but it is possible that it may record fact, as is more probably the case with the direct testimony of Caesar about certain Britons.

After speaking of the inhabitants of the coast as much superior to those further inland—being, as we gather from another passage, Belgic conquerors⁵⁴—he goes on to say: Ten or twelve of them have wives in common, mostly brothers with brothers, or parents with children, the offspring being reckoned to belong to the first cohabitant. The statement, taken strictly as it comes, refers apparently to all the Britons: in general sense it certainly suits better with the savage inlanders.

In these two cases, there seems fair evidence of a very barbarous early condition recorded by competent authorities, and, in the latter, from personal observation. But, in both cases, at least if my suggestion is tenable about the Britons, it is the condition of a people about whose racial provenance very little is known. They may have been Indo-European of an early emigration: they are quite as likely to belong to a Turanian group. I class them, therefore, in the same doubtful category with the earlier stocks of Asia Minor and Greece (see next page), to which probably belong also the Picts, of whose Polyandry we are told by Nennius⁵⁵.

In early Greek legend, so far at least as regards the pure Aryan stock of which I am speaking, I find any indications of a pre-Monandrous condition slight and doubtful. An immense amount of matter has been collected by Bachofen with a view to the establishment of his Gynaecocratic theory, but which has also a distinct bearing on the slightly different one of M'Lennan. Bachofen's work does not refer so much to

⁵⁴ B. G. 2. 4 and 5. 14. See Beale-Poste, Brit. Researches, p. 146.

⁵⁵ M'Lennan, Studies, p. 99, refers to App. li in the Irish Nennius. This is apparently the statement on pp. lv, lvii of the Appendix to the Edition of 1848 published by the Irish Archaeological Society.

ethnical differences as to stages of political and social or rather religious development.

Still it must be noted that the régime of female supremacy, which he makes to precede that of the father⁵⁶, is most closely connected with those Minyan, Lemnian and generally Pelasgian legends which, if they are really derived from the Indo-European stock at all, belong in all probability to an early emigration of that stock, possibly prior to its assuming the Aryan characteristics which are common to our parent races⁵⁷. On this subject in general, and specially for the connexion of Pelasgian blood with the Bear rites found in aboriginal Arcadia, see Herodotus' sixth book⁵⁸.

To these older legends may possibly be referred that right of a maternal uncle to succeed to his nephew's property upon which M'Lennan⁵⁹ lays much stress in the story of Meleager, if this part of that story be not, as I am rather inclined to believe, a detail added by Augustus' librarian Hyginus.

Woman in Homeric and post-Homeric times. In the references to more genuine Hellenic belief and early practice furnished by the Homeric poems, the important position of the wife and mother is undoubted as also the special relation of brother- or sister-hood by the same mother. But, while the former seems to me perfectly inconsistent with any lingering idea of Polyandry, the latter is not, I think, any strong argument for the previous existence of such a condition, but does somewhat point to an original Polygyny⁶¹. Hence would come the naming of the sons after

Bachofen, Mutterrecht, pp. 88, 213—218.

⁵⁷ Rawlinson's Herodotus³, iii. pp. 510—515 and 533—538 with the notes.

⁵⁸ cc. 137, 138: also below, § 5, App. 11, p. 191.

⁵⁹ Studies, pp. 225, 226.

⁶¹ ib. p. 201

the mother; and hence the stress laid upon uterine relationship, not instead of, but in addition to, paternal⁶².

The declining deference paid to women, in the post-Homeric times, is accounted for by M'Lennan, on the ground of a growing preference for agnatic descent, i.e. descent traced exclusively through males: with Bachofen it is part of the struggle between two religious principles, the maternal and the paternal—victory ultimately resting, as shewn in Aeschylus' Eumenides, with the latter⁶³.

Declining deference explained. This descent in the status of women, or rather ladies, is a curious fact, though not without parallel, if the stories of chivalry be true, in modern history of the late mediaeval and post-mediaeval period. I believe it may be fairly accounted for by the leveling social effect of a more crowded association into towns, the noble and dignified position of the Homeric chieftain's wife being longest retained in backward or conservative Sparta⁶⁴.

In speaking of Sparta, I may now refer to some of the strongest pieces of evidence in favour of M'Lennan's theory, derived from that country. Xenophon, or the author of the treatise on the Lacedaemonian Constitution attributed to him, alleges, as part of the legislation of Lycurgus, the allowance of a Dyandry at Sparta, under which the same woman could be mistress of two houses and legitimately cohabit with two males⁶⁵. The supposed objects of this particular institution, inter alia, are stated, with the usual pedantry of a philosopher, at some length: but I think we

⁶² Studies, pp. 207—209. Instance άδελφός, ὁμογάστριος, &c.: see also below (p. 40) on germanus.

⁶³ Studies, pp. 199, 209: Bachofen, Mutterrecht, pp. 50, 51 and section 29 generally.

⁶⁴ M'Lennan, Studies, p. 216 n.

⁶⁵ Xenophon, Rep. Lac. 1. 9 (Grote, ii. p. 303, n. 2): see also Müller's Dorians.

see, through them, the attempt to account for an inexplicable tradition—a tradition which has, for us, its own value as evidence of a very remote earlier state of things in the Peloponnesus. That any woman could have reputably lived in such cohabitation among the Spartans in Xenophon's time seems to me irreconcileable with the repeated portraitures of the noble and faithful Spartan wife⁶⁶.

Polybius⁶⁷, in the fragmentary remains of his twelfth Book, has occasion to criticise severely the historical statements of Timaeus as compared with those of Aristotle, in particular with reference to the origin of the Epizephyrian Locrians. This people, whose early gynaecocratic character is insisted on, at great length, by Bachofen⁶⁸, was, it is evident, largely mingled with, if not composed of, the aboriginal Sikels, who, if Indo-European at all, belong to the earliest and pre-Aryan emigration69. But the remarkable point, with which I am at present concerned, is the allegation by Polybius, and presumably by his authority Aristotle, of a custom, common to these Locrians and the ancient Lacedaemonians, for three or four men, more often brothers. to have the same woman and the children in common⁷⁰; creditable, too, as well as customary, for a man who had sufficient children to hand over his wife to another 71.

These passages are alleged by M'Lennan⁷² as proofs of Polyandry at Sparta in the days of Xenophon and Polybius, from which, as from certain traditional stories about Lycurgus, he infers that a similar form of union existed, in earlier times, among the Hellenic race at large. The writers quoted are among our most trustworthy authorities, and the evidence is undoubtedly strong. All I can say in answer is

⁶⁶ Grote, ii. p. 303 and notes. 67 Polybius, 12. 2, Res Locrensium.

Bachofen, Mutterrecht, pp. 309—313.

⁸ Rawlinson's Herodotus, iii. p. 419.

⁷⁹ See Bachofen, Mutterrecht, p. 198.

that the existence of such a state of things at Sparta in the times of Polybius and Xenophon is quite inconsistent with what other testimony we have as to those times; and that, if what they tell us is merely tradition, I do not see why that tradition may not refer to the very remote period before Aryan institutions and principles were fully established, and the savage customs of the aboriginal inhabitants still prevailed.

The same remark applies to the very slight evidence, from early legend or tradition, of practice, in Attica, for a matriarchal or premonandrous condition⁷³.

To take first a very high authority, even for a country not his own, if he came directly to us, Varro, as quoted and interpreted by St Augustine 74. The Athenian practice of naming a child from father or grandfather, not, as previously, after its mother, dates, according to this authority, from the reign of the fabled founder of the race Cecrops. It is Cecrops too who is represented by Clearchus as instituting not only monandry but monogyny, after a period of promiscuous intercourse, in which none knew who was his father $\delta\iota\dot{a}$ $\tau\dot{o}$ $\pi\lambda\dot{\eta}\theta o s^{75}$. The last named author is certainly deserving of some credit, as a pupil of Aristotle enjoying the highest repute among the Peripatetics 76: and I am willing to accept the above evidence as pointing to the barbarous condition of a primeval race in Attica, but nothing more 77. Other evidence, however, is adduced by M'Lennan, in favour

⁷³ See Bachofen, Mutterrecht, p. 41, and M'Lennan, Studies, p. 235.

⁷⁴ Augustine, Civ. Dei, 18. 9. Whatever discredit, if any, may attach to the story, from the general tone of its reporter, must apply a fortiori to the very wide statement of Minucius (Octavius, 31) "Atheniensibus cum sororibus legitima conjugia." See below on the case of Cimon.

⁷⁵ Athenaeus, 13. 2. On the Indian tradition of Svetaketu, M'Lennan, Studies, p. 119, n. 1.

⁷⁶ Clement of Alexandria, Stromatum I. xv. 70 (Dindorf).

 $^{^{77}}$ See Herodotus, 8. 44 as to the Pelasgic character of the pre-Cecropian inhabitants of Attica.

of an original "Nairpolyandry" practised in ancient Attica⁷⁸, though it does not appear to bear so directly on that subject as the reputed statements of Varro and Clearchus.

According to a Scholium on the Nubes of Aristophanes 79, by the Athenian law of the time of that author (or of the Scholiast), an Athenian might marry his sister by the same father. This is the law or custom referred to by Minucius (see above, n. 74), and made out by Philo Judaeus to be an ordinance of Solon⁸⁰, which allowed marriage with sisters by the same father, but not with sisters by the same mother. It is the latter and more distinctly incestuous connexion which Euripides is censured for bringing on the stage in the story of Aeolus' children Macareus and Canace. The marriage represented as legal is stated to have occurred between a son and daughter of Themistocles⁸¹: but the most noted case is that of Cimon and his sister Elpinice, which is specially mentioned by Cornelius Nepos as an instance of the "institution" accepted by the Athenian citizens82. The story, as told by the late and gossiping authorities last referred to, is contradictory and improbable: but it is obvious that the marriage between this brother and his nonuterine sister, as represented at any rate to us, was considered to involve a certain degree of scandal, even if permitted by law. The strange quasi-Levirate represented by Plutarch as set up or recognised by Solon⁸³ in the case of an heiress, is subjected to much unfavourable criticism by the author who records it. It does not apply to the case of Elpinice, who

⁷⁸ M'Lennan, Studies, p. 243 note.

⁷⁹ Line 1371, ed. Rutherford.

⁸⁰ Philo, περὶ τῶν ἀναφερομένων ἐν είδει νόμων, p. 779 (ed. Cohn and Wendland, v. p. 155), quoted, Petit, Leges Atticae (1742), p. 537.

⁸¹ Plutarch, Themistocles, c. 32.

⁸² Nepos, Praefatio and Cimon, 1: see also Athenaeus, 13. 56, who adds an improbable scandal about the great Pericles.

⁸³ Plutarch, Solon, 20,

was not an $\epsilon \pi i \kappa \lambda \eta \rho \rho s$; and is surely in itself rather a device for keeping property in a family⁸⁴, than any survival of or return to polyandry.

To all the above considerations may be added the opinion of Aristotle that a community of women and children is neither expedient nor practicable⁸⁵ which may be taken as some argument against his really believing that such a community ever existed in times of which he had any record or credible tradition, at least among the peoples in which he was specially interested.

Teutons. Among our own early English or Teutonic ancestry, as distinguished from the still earlier occupants of these islands (above, pp. 31, 32), I can find no trace whatever of Polyandry or Matriarchy. In the doubtful and oft-quoted passage of Tacitus' Germania (c. 20) referred to by M'Lennan the first part may be taken generally to mean that the tie of relationship is held in equal regard with the Germans through females as through males 86: in the latter part the alleged preference for sisters' sons as hostages is explained by the desire of those requiring such hostages to have as wide a circle as possible, not only of consanguinity but affinity, of connexions to be depended on, as interested in the hostages' fate87. In another passage of the Germania (c. 7) compared with Caesar, B. G. 6. 19, we have to my mind the strongest testimony against any "regiment of women"-in favour, on the contrary, of the noble incitement to valour for mother

⁸⁴ See Enuptio, § 5, pp. 150, 151.

^{**} Aristotle, Politics, 2. 3, 4. See on the whole subject both of the $\epsilon\pi$ iκληροι and marriages of brother and sister at Athens, Petit, Leges Atticae, pp. 534—538.

⁸⁶ In an obviously intended contrast to Roman law: see Gains, 1. 156.

⁸⁷ I venture on this interpretation of the obscure "tanquam...donum latius teneant" with much hesitation. I think however it rather agrees with M'Lennan's view of these particular words, though of course he puts a different construction upon the whole passage. P. T. pp. 252, 253.

and wife of which we have so many instances 87a. I must leave to another section what is to be gathered from the derivation and explanation of the old word for kin (maegth) in our Anglo-Saxon laws and poems, merely remarking here that it does not appear to give any real support to M'Lennan's theories. Our earliest legal use of the word is in a matter obviously of simple practical convenience: the fatherless child follows the mother, it is true, as regards custody and nurture, but it is the paternal relatives who have the care of his property88. In the interesting work of Miss Phillpotts88a, to which I shall have hereafter (§ 4) to make much reference, we shall find occasional reference to a system reckoning kinship through the female; more often (op. cit. p. 274) to groups which may be hypothetically arranged on patrilinear or matrilinear lines: but the organisations usually dealt with are either genuinely agnatic, or a looser complex of relations reckoned through both sexes: of Polygamy, or its extraordinary pendant, gynaecocracy we have not a word. It must, however, in fairness be remembered that the proper subject of this book is mainly limited to the cohesive action of the kindred with reference to wergild, and the gradual decay of the kinship tie, in this particular respect89.

Rome. Lastly we come to the indications, scarcely deserving that name, of a possible premonandrous condition, or at least of a time when the maternal power was predominant, at Rome.

⁸⁷a See e.g. the story of the women of the Teutones and Cimbri, Plutarch, Marius, 27: Florus, Epitoma, 1. 38. 17.

⁸⁸ Hlothar and Edric, 6.

^{**}sa Phillpotts, Kindred and Clan among the Teutons, pp. 2, 131, 274. In the first passage, the statement of a note, that kinship through the mother was recognised in Ancient Rome, probably refers only to the late admission of cognati, for inheritance, not to any primeval Etruscan custom: see however, below, p. 42.

⁸⁹ Below, § 4. A good deal of Maitland's chapter vi. 1 (P. and M. ii.) naturally turns on the same subject, viz. the bond of participation in Wergild.

Some stress has been laid on Etymology, which, in this case, amounts to very little. The word germanus may possibly, like $\dot{a}\delta\epsilon\lambda\phi\dot{o}s$, have special reference to the womb⁹⁰, and therefore be evidence of a closer relationship once recognised when the parties are from the same mother⁹¹. Even then, I do not regard it as pointing to more than a possible ancient Polygyny; and the derivation of the word is, by good authority⁹², held to be rather from growth or descent in general. In use, this word and its descendants indicate relationship by the same father and mother, or by the same father, quite as much as by the same mother, alone.

Parricida is, as I have endeavoured to shew elsewhere 92a, probably shortened from parenticida, so that this undoubtedly very old word designates the murder or outrage of either father or mother, according to the usual sense of parens. No doubt it may be maintained, on derivational grounds, that parens is strictly proper of the mother alone. But I do not think this point so conclusive, as against the generally accepted meaning, among ancient authors, of parricida, that any argument, as to prehistoric sociology, can be based upon it. The old derivation, from patricida may also be borne in mind, although I cannot accept it myself.

Mater Matuta. The individual traces of an original Mother-right quoted by Bachofen from surviving religious practice at Rome appear to me very slight and inconclusive. Such are: the peculiar worship by the Roman women of the Mater Matuta (Leucothea) of which nearly all that we know

⁹⁰ See Corssen, Nachträge, p. 236: Curtius⁵, p. 479.

⁹¹ Varro ap. Servium on Acn. 5. 412. de eadem genetrice manans non. ut multi dicunt, de eodem germine, quos ille (Varro) tantum fratres vocat.

⁹² Skeat, Etym. Diet. s.v. German, but see note above.

⁹²a Clark, Early Roman Law, p. 43: also below, § 19, App.: see too M'Lennan, Studies, p. 238, and Bachofen, Mutterrecht, p. 31.

is contained in the two passages quoted below⁹³, the occasional preference for the factor 7 over 5 or 10, the still more occasional replacement of the latter by 12^{94} and other matter of even more doubtful significance. Most certainly no preeminence of the women is indicated in the old marriage formula "ubi tu Gaius ego Gaia," to whatever antiquity the marriage in which this formula occurs may lay claim⁹⁵.

Story of Cato Minor. It is, finally, somewhat significant that the most direct testimony to the existence of anything, at Rome, resembling the alleged Lacedaemonian institution (above, pp. 34, 35) lies in the strange and evidently most unusual case of Cato Minor passing on his wife Marcia to Q. Hortensius "according to ancient Roman eustom." The actual fact is, I suppose, an instance of the easy dissolution of marriage sine manu even in the Republic (below, § 3, p. 100).

Strabo mentions this queer transaction à propos of some barbarous tribe who part with their wives after they have had two or three children. I imagine the 'Pωμαίων ἔθος to have some reference to the avowed principle that a good Roman citizen only keeps a wife liberorum quaerendorum causa (§ 3, pp. 65, 98). One would scarcely

⁹⁵ Bachofen, Mutterrecht, p. 32. See Plutarch, Quaestt. Rom. 16, 17, and the unsatisfactory explanation by Bachofen beginning with the words Ino-Matuta. Mater Matuta is a very early object of Roman worship (Livy, 5. 19). Obviously a goddess of the Dawn (see Lucret. 5. 656) she is not unnaturally connected with birth. This appears indeed to be the ground of her relation to Carmentis (Paley on Ovid, Fasti, 6. 529). As a goddess of birth she is honoured by the Roman matrons at the *Matralia* described at length by Ovid (Fasti, 6. 475—558). It is however in the old character indicated by the derivation of her name (Corssen, Beit. zur Lat. Formenlehre, p. 518, *Morgen-frühe*) that she becomes identified with the Greek White Goddess Leucothea; it is certainly only by the legend of Ino that Plutarch's Quaestt. 17 can be explained.

⁹⁴ Mutterrecht, pp. 60, 61, 325.

⁹⁵ ib. p. 42. See below, § 3, pp. 81, 103.

⁹⁶ κατά το παλαιον 'Ρωμαίων έθος, Strabo, 11. 515

have credited the story (although coming from almost a contemporary) but for Plutarch's narrative to the same effect (Cato, c. 25) being backed by a considerable amount of circumstantial evidence. He adds, in a later chapter (Cato, 52) that his hero afterwards remarried Marcia, as the wealthy widow and heiress of Hortensius, for which he incurred one of the principal censures of Caesar in the clearly historical Anti Cato 97

There is, however, one remarkable excep-Etruscans. tion, if it be really an exception to the above general statement as to nations of Aryan breed, which may possibly account for the survivals, if any, of a matrilinear period in the early history of Rome. Until more is known of the Etruscan language, we cannot definitely exclude that remarkable people from the Aryan Stock. But the tendency of modern archaeological study, as of the earlier research of Bachofen 98, is certainly to attribute to them a Lydian or even further Asiatic, possibly a Semitic, origin.

Tanaquil. The direct subject of the work above referred to is an analysis of the legends of Tanaquil and the Tarquinian family, in the light of its author's theory of Gynaecocracy or Mutterrecht. The connexion of the evidence there collected with the historical probabilities about the addition of the third so-called Romulian tribe is very slight and, if worth notice at all, belongs to a later section (6). The field covered by Bachofen's investigation of these Tanaquil legends comprises however a very much wider range of subjects. Almost all Roman institutions are made out to be more or less connected with this most paradoxical development of the Oriental Haram Queen or Temple prostitute into the business-

98 Die Sage von Tanaquil.

⁹⁷ Compare, with Plutarch, his own Caesar, c. 54: Suetonius, 56: Cicero, ad Att. 12. 41. 4; Topica, 25. 94. For another interesting trait of this philosopher Square, see Martial, 1. pr. and a good note of Gifford on Juv. 6.385.

like and respectable patron of Servius⁹⁹. Even the sandals, in which, amongst other things, Plutarch recognises the stay-at-home Roman matron, recall to Bachofen the slipper of Omphale¹⁰⁰. It is only here and there that one can fix upon some definite semi-historical statement capable of serious discussion.

Confusion with Sabines. For instance, among the evidences of the original gynaecocracy personified in Tanaquil, I find a special Sabine use¹⁰¹ of the praenomen Spurius remarked upon, somewhat obiter, but still evidently regarding this use as somehow indicative of exclusive matrilinear descent¹⁰².

As to the derivation of this curious praenomen, without going into the unclean fancies of Plutarch (whom Bachofen quotes), I agree with him in rejecting that of Gaius¹⁰³ on which it is obvious Bachofen's argument in favour of original Mutterrecht pro tanto is founded. Now Roman praenomina are probably based in general, as Mommsen¹⁰⁴ observes, upon circumstances (e.g. time of day, &c.) of birth: sometimes upon hopes or happy auguries from appearance: that they should ever record such a circumstance as doubtful paternity seems to me incredible in the Roman family as we know it, and meaningless in a previous time of indiscriminate intercourse¹⁰⁵. The "Bastards" of mediaeval

⁹⁰ See the final statement of this paradox on p. 279 of the Sage von Tanaquil

Tanaquil Sage, §§ 10 and 12: see also § 31, but particularly pp. 58, 75.

The Sabine element is, throughout the book, closely connected with the Etruscan: on the ground, I imagine, of religious observances at Rome being mainly traceable to the one or the other. This leads, of course, to some contradictions, or inconsistencies, in the character of Servius, the commons' King, Tanaquil, p. 265.

¹⁰² Tanaquil Sage, p. 78, nn. 22, 23.

¹⁰³ Gaius, 1. 64. spurii...σποράδην concepti.

¹⁰⁴ Forsch. i. p. 43.

¹⁰⁵ Rarely on cases of pain and death. See Genesis 35. 18 and the lines on *Tristan* in Matthew Arnold's fine poem.

European history are generally persons of note, recognised as men by their fathers, not stigmatised from birth as having none. How the adjective Spurius got its meaning, or what is the true explanation of the praenomen, we cannot tell¹⁰⁶. But that the latter is no argument for matriarchy I am convinced.

Etruscan inscriptions. The facts more directly bearing on Bachofen's theory, as evidenced by Etruscan practice, are to be found in his Appendix to Die Sage von Tanaquil. These consist mainly in the survival, into quite late Republican, or even Imperial times, of numerous funereal inscriptions, in which the mother of the deceased is evidently regarded as of equal importance with the father—occasionally of greater 107. They undoubtedly evidence the careful preservation of Etruscan pedigrees, and may not impossibly indicate a sort of feminine reaction or revolt of the spindle side, as they mostly date from a time when the old paternal, and marital, authority had become considerably relaxed: that they relate back to an exclusively matrilinear period I must take leave to doubt.

Praetor's recognition of cognates. So too with regard to another suggestion that an original relationship through females may have been the ground for the Praetor's recognition of *Cognati* as entitled to succeed on an intestacy. Here the lateness of this recognition has been already pointed out (above, n. 88a); and the letting in of female claims as stock of descent is, I think, more easy to account for on grounds of equity and natural affection than by supposing any

¹⁰⁶ Most philologers appear to feel the impossibility of the *praenomen* bearing any such meaning. The derivations suggested for Spurius are all unsatisfactory: as are those for the English word Bastard.

¹⁰⁷ Bachofen, Die Sage von Tanaquil, Beilage, especially § 1, pp. 282—290. It is possible that this fact may have given rise to Miss Phillpotts' statement mentioned in n. 88^a.

reference to an obsolete system which is at best hypothetical ¹⁰⁸.

In bringing the subject of this section to a close, I must admit to have made, as elsewhere, considerable use of arguments from etymology, which are not now so much in favour as they were a short time ago, though to my judgement they appear as strong as ever.

Max Müller. I may perhaps be allowed to add here that according to Max Müller, and other by no means contemptible authorities, words relating to the Family, which are widely spread among the group of Aryan or Indo-European races, furnish conclusive evidence that the monandrous stage had been attained by this group before its dispersion or emigration 109. The same conclusion has been arrived at by Jhering 110, from archaeological research or speculation, mainly independent of philology, on which latter department he does not particularly rely.

Jhering. When, therefore, this great authority, among his Starting Points, or original elements of Roman Law¹¹, puts first the principle of "Subjective will" in the individual, manifesting itself in self-help¹², he does not, I think, refer to individuals in Bachofen's previous savage or matriarchal stages. He rather, as I at least infer from his silence on that subject in the "Geist," assumes the paternal or patriarchal State (see below, § 3, p. 50) as already established among his spearmen, with all their rough notions as to the origin of property in capture, &c. I venture, therefore, in availing myself of Jhering's most suggestive work, to take

¹⁰⁸ Rivier, Famille Romaine, p. 7, n. 2, speaks of a return from the civil system of the family to that of the jus gentium. A very vague and unsupported suggestion.

¹⁰⁹ Max Müller, Biographies of Words &c. xvi. p. 156: Rivier, Famille Romaine, p. xi: Pictet, below, § 3, p. 53. Contra, Dargun, passim.

¹¹⁰ Evolution of the Aryan, tr. p. 41.

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the Family still as the originating unit in the development of Roman Law generally: though I quite agree with him in treating the Family not alone, but together with a military system, as the starting points of a true Staatlichen Ordnung or constitutional arrangement¹¹³.

This view of Jhering's conception, inferred from the "Geist," is distinctly confirmed by his posthumous work which is styled by its translator the "Evolution of the Aryan." With an evident knowledge of the Matriarchal Theory, he deliberately rejects "maternal right" from the institutions of the Aryans, long before the Indo-Europeans separated from them¹¹⁴. With such high authority, the present author may perhaps be excused for preferring the Patriarchal Theory in its simpler fundamental principles (above, p. 20) to the ingenious structure raised by Bachofen and M'Lennan upon supports the main recommendation of which appears to be their bizarre and repulsive character.

¹¹³ Jhering, Geist⁵, i. p. 176.

 $^{^{114}}$ Jhering, Evolution of the Aryan, tr. p. 40, and generally Book i. ch. ii. § $\epsilon.$

§ 3. THE ROMAN FAMILY

GENERAL treatment of subject, p. 47. Monandry and Monogyny, 48. Patria potestas in general, 49. Its suggested Roman modification, 50. Its sanctions, 51. Pater, 52. Familia and Liberi, 53. Roman potestas and its limitations, 54. Council of family or neighbours, 55. Public office of son, 56. Power of life and death. 57. Exposure of infants, ib. Sale, 59. Noxal surrender, 60. Slaves, 61. Family property, 62. Parallels, ib. Conclusion, 64. Gaius' arrangement of Book 1, ib. Investitive facts, ib. Justae nuptiae, 65. 1. Non-relationship, ib. 2. Conubium, 68. Between Patricians, ib. Between Plebeians, 69. Nuptiae simply, form, 70. Sponsalia, 71. No proof of marriage by capture, 72. Adoption, 73. Manus as condition, ib. Mundium, 76. Investitive facts. confarreatio, ib. Archaic character of, 77. Probably peculiar to patricians, 78. Coemptio, materfamilias, 79. Boethius on, 80. Ubi tu Gaius, etc., 81. Usus and usurpatio, 82. Marriage sine manu, 83. Father's potestas abducendi, ib. Perpetua tutela mulierum, 84. Investitive facts of marriage sine manu, 85. Coemptio fiduciaria, 86. Conclusion, two forms ab initio, 87. Mancipium, ib. Divestitive facts, of potestas, 89. Natural or civil death, ib. Child's tenure of office, 90. Emancipation, adoption, 91. Of manus, ib. Of marriage generally, ib. Natural or civil death, 92. Mutual dissolution, diffarreatio, 94. Manumissio, 95. Divorce generally divortium and repudium, 96. Romulian law. ib. Story of Carvilius, 97. Reconciliation of these accounts, 99. Dos. dotis dictio, &c., 100. Conclusion, 102.

General treatment of subject. To determine exactly the scheme and general arrangement of Gaius' first Book is. as will be seen from section 12 of my last part (Jurisprudence), an extremely difficult matter. We cannot even lay down as an invariable rule, what I think is generally true, that his order of treatment is first to state briefly the nature of the

particular personal condition in hand, and follow up with the Investitive and Divestitive Facts; which is, on the whole, the plan adopted by myself in the present section.

The most important part of the Jus Personarum is devoted to the Conditions of Family subordination, potestas, manus and mancipium. The subjects of tutela and cura which occupy its latter portion, although also belonging to Family Law, are best treated, as Gaius treats them, somewhat apart from these more purely personal relations.

The account of these conditions themselves has, we find, to be largely supplemented from other sources than the Institutes, whether of Gaius or Justinian, which dwell much more on the Investitive and Divestitive Facts¹. This is especially observable in their treatment of the servile and semi-servile conditions which, at great length, precedes family law proper². It is, however, with this last alone that I am at present concerned, as dealing with original constituents or elements of the early Roman polity. A few notes on the condition of the slave are added below (p. 61), after the description of that potestas, under which both he and the child are said to be³, but which, in its peculiar Roman characteristics, applies more especially to the latter. A propos of this application I must again refer very briefly to a subject treated at some length in the last section.

Monandry and Monogyny. I have endeavoured to shew that, in the branch of Mankind to which we, together with the Greeks and Romans, belong, the Monandrous Family—of wife or wives, children and dependents under one male Head—was a development probably reached before the dispersion or emigration of the Aryan races, and one

¹ Jurisprudence, ii. pp. 471, 472.

³ ib. pp. 466, 467. In Gaius, 1. 11—47, most of the law is late Republican or early Imperial: the earlier forms of manumission will be treated hereafter, see p. 62, n. 58³.

³ Gaius, 1, 51, 52, 55.

which at any rate seems to have preceded any of the larger associations, among those races, which have gone to the making of a State. At Rome, this institution, with apparently the further limitation to a single wife, is, as far as our knowledge goes, primeval. To the same prehistoric period, we must refer that peculiar power of the Head, the extreme development of which—notably as to wife and children—and its long survival, are among the most remarkable features in the Roman economy (see § 2, p. 25).

Patria potestas in general. Dionysius4 who gives a good picture of the patria potestas as it existed, or was universally believed to have existed, in early historical times, intimates the existence of a period anterior to this institution, which latter he attributes to Romulus. The name of that founder, as it is certainly conclusive against his own reality (see § 1, pp. 11, 12), is generally as conclusive for the insurmountable antiquity of most institutions traditionally connected with him. The true origin of this particular one is distinctly recognised by Ulpian⁵ as customary. The invention of an individual legislator for such principles, whether they have permanently remained in the form of custom or been recast in the mould of law, is not peculiar to Rome. At the present day there are extant in India many customary duties of which the most plausible account is that they were at the outset obligations sanctioned, according to Maine, by general "patriarchal" authority; yet childish stories attributing their origin to mere accident are often current among the Indian villagers, or they are said to be observed in obedience to the order of some comparatively modern king6.

It is however as has been intimated above (§ 2, p. 25) by no means certain that the patria potestas, in its despotic

^{4 2. 26, 27.} Ulpian, Dig. 1. 6. 8. pr.

⁶ Maine, V. C. p. 111: also above, § 2, pp. 21, 22.

relation to the wife and children, may not have been a special Roman developement. Maine's criticism of Gaius, 1. 55, and his assertion of a more general, or universal, prevalence of this power, have been in their turn, to my mind successfully, criticised by M'Lennan; who shews, for instance, that it is very questionable whether anything like the power of the Roman paterfamilias was exercised among the early Hindoos, Slavs or Irish (to whom Maine specially refers) even where there was an approximation to the Roman male head? I cannot agree with this author as to the probability of Gaius' exhaustive investigation into the family institutions of the various nations constituting the Roman world⁸ but I certainly think more weight should be given, than Maine gives, to that Jurist's view of the Roman patria potestas as almost unique.

Its suggested Roman modification. In a somewhat difficult and involved section of the Geist⁹, Jhering appears to recognise, in Rome, an original patriarchal State, considerably modified by the later artificial introduction of a military constitution; so that, when we first catch sight of the whole system, the military element (although still connected with a gentile association) has virtually supplanted the old patriarchal system. This view is further complicated by his assertion that the Family nevertheless continues to be the prototype or model of the entire Constitution which ultimately results.

Jhering's theory can only be partially and imperfectly indicated here, because its consideration depends, not only upon the political or military function of the Roman gens as a body¹⁰, which in my judgement he greatly exaggerates, but

⁷ M'Lennan, P. T. pp. 68, 99, 100, 102, 105, 108, 134—136. Also below, pp. 62—64.

⁸ M'Lennan, ib. pp. 137, 138.

⁹ Geist des Röm. Rechts⁵, i. § 13, pp. 176-182.

¹⁰ Treated below in § 5. See, particularly, pp. 156, 157.

also upon the prior formative influence of the *tribe* considered as a Host¹¹.

Meanwhile the order of Roman civil development, thus far sketched out, involves at the outset an assumption the difficulty of which is not confined to Rome.

Its sanctions. Before we enter into further detail as to the conditions of the Roman Family, the question naturally arises by what sanctions a patria potestas, whether in a milder general or a stricter Roman form, was supported. Jhering, dealing with the latter case, speaks as we see of an "original patriarchal State" which is subsequently modified as above described. The expression is subject to the ambiguity or generality of meaning attaching to the word "state," which has been referred to in a previous part of this work 12, where it was preferred, for the particular purpose in hand, on that very account.

The first thing approaching to a State (meaning civitas) in Roman historical, or prehistorical, civil development, might appear at first sight to be the Romulian tribe: the reasons for my rejection of it, in that sense, will be given hereafter¹³. On the other hand, a patriarchal condition, according to the view here taken, is prior either to the Romulian tribe or to any other more truly constitutional, or civil, form of union. Its attribution to a fabulous legislator (above, p. 49) has only a vaguely relative chronological significance as indicating a very early stage of social development.

Now, in picturing the original Head of an individual family per se, we cannot but recognise that the isolated position, for example of the Hebrew Patriarch, can scarcely have been a matter of ordinary occurrence¹⁴. Without

¹¹ See § 6, particularly, pp. 243-246.

¹² Jurisprudence, i. p. 149.
¹³ § 6, cit. in n. 11.

¹⁴ See M'Lennan, P. T., in which ch. v. is an elaborate developement, or rather abstract, of the controversy between Locke and Filmer as to the alleged patria potestas among the Hebrews.

special circumstances, of supernatural segregation or selection, he is almost as inconceivable as the solitary savage of Austin¹⁵. In fact we seem driven to assume, for this patriarchal condition, a social, or semi-social surrounding. The actual physical superiority of the paternal Head could not always last, even for his own life. Long habits of obedience, besides personal affection, and probably fear of supernatural anger against the disobedient, might in general secure his authority. Still there must have been cases where these motives required to be backed by others dependent on external human disapproval¹⁶. The particular mode in which such sanctions may have operated, as also the degree of paternal authority exercised in those primeval days when the Monandrous Family was first developed, are questions too remote for any fruitful discussion here. At Rome, in the early time designated by the alleged legislation of Romulus and Tatius¹⁷, devotion to the Gods presiding over such relations was the recognised penalty of violence to a parent. On this virtual outlawry I shall speak more fully hereafter. Here I only wish to note that the mere existence of a patriarchal condition seems to postulate a degree of social union among the families concerned18.

Pater. Despotic power is not, of course, the only aspect of the paternal relation, however it may have been emphasised at Rome by special circumstances of military subordination. In the old Roman word paterfamilias, the first part, so widely spread among the Aryan nations, would seem (though its etymology is matter of dispute) to be accepted by the best authorities, as meaning the nourisher, protector, or

¹⁵ Jurisprudence, i. p. 100.

¹⁶ ib. p. 102.

¹⁷ Festus, F. p. 230, s.v. Plorare; P. p. 109, s.v. Implorare and p. 77, s.v. Endoplorato.

¹⁸ Jurisprudence, i. p. 99.

maintainer rather than the owner or lord¹⁹. The Roman use of the word may possibly, however, be more particularly illustrated by the *second* part of the compound *paterfamilias*, which bears, in its archaic form alone (familias), evidence of high antiquity.

Familia expresses one of the most fundamental ideas in Roman Personal and Property Law. The legal use of the word in the latter department is considered elsewhere (Jurisprudence, ii. p. 544): its original meaning and derivation are not certain. Once supposed to come from roots indicative either of the warm hearth or the hungry dependents²⁰, it is now more satisfactorily connected with an Oscan word faama meaning the House²¹. Hence familia is the Household, i.e. the House inclusive of the persons dwelling therein. In its strictest use, it apparently indicates rather the free persons under the power of the Head of the Household, but it is easily applied to all under that power. It is in the former sense that it is sometimes extended to those members of a gens who are proveably descended from one male ancestor²².

Liberi. As between the members of a household, a distinction would naturally in course of time come to be drawn between the *free* (*liberi*)—mostly said of children—

¹⁹ Curtius, p. 270: Corssen, i. p. 425: Fick, i. pp. 70, 471. Dargua (p. 74) ignoring the termination of pater, which expressly denotes agency, confines his remarks, on the origin of the words, to the initial sounds pa and ma occurring "from mere easiness of utterance all over the earth." Pictet (Origines, § 294) also recognises these as instinctive sounds, but thinks they were afterwards connected, by the Aryans, with the verbal roots på (tueri, servare) and må (efficere, creare). I prefer to hold, with Curtius, Corssen, and Fick that pater and mater (see below, p. 79) are words having originally a specific signification.

²⁰ Corssen, Beit. zur Lat. Formenlehre, p. 185. Pictet, Origines, § 302 (iii. pp. 69, 70).

²¹ Curtius, p. 254 (see however Corssen, i. p. 143, n.). With Curtius are Skeat, s.v. Family: Jhering⁴, ii. 1, p. 161, n. 214: Mommsen, Sr.³ iii. p. 54, n. 1. Both of the last two well compare, in point of meaning, olicos, olicérat.

²² See below, § 4, p. 111.

who can do as they like²³, certainly within rather narrow limits, and the bond or bound²⁴. But in the earlier days and simpler life of Rome, the literal slave was probably neither so frequent nor so degraded a member of the family as after the subjugation of Italy: and famulus originally was rather a house-servant or domestic, not necessarily a slave²⁵. Familia, in later times, frequently meant, no doubt, the body of slaves belonging to a particular owner or household. Familia in a more general property sense has been sufficiently treated elsewhere²⁶.

Roman Potestas and its limitations. The abovementioned facts and traditions may point, as Jhering seems to intimate, to a special Roman developement of this power over the child, equal to that over the slave; or to an original chattel position of both. We certainly find this latter position practically recognised as a fact in early and at least quasi-historical times²⁷. In the writings of the later legal authorities, the patria potestas presents itself to us as undergoing successive limitations, by custom or statute, which e converso go far to shew that the original (or, as we should say, the "common law") unlimited rights of the Roman paterfamilias were at one time those of ownership over both goods and persons²⁸. This however is considered more in detail below.

The few early limitations upon parental and marital authority were, it would seem, referred, in tradition, to the

²³ Jhering⁴, ii. 1, p. 182 n. As to liber from libet see Curtius⁵, pp. 367, 497 and Pianigiani, s.v. Libero: Corssen², i. 151, 379 is doubtful.

²⁴ Pianigiani, s.v. Servo, better than the derivation implied in Curtius, p. 551 (cf. Justinian, 1. 3. 3). See also Cuq, i. p. 79, n. 2.

²⁵ Mommsen, Sr. iii. p. 54, n. 1.

²⁶ Jurisprudence, ii. p. 544.

²⁷ See below, pp. 58—60 and compare Dargun, ch. 3, who there strangely derives a vermôgensrechtlich relation of Man to Wife and Father to Children from an original Mutterrecht.

²⁸ See Jhering, ii. p. 182.

same primeval regal legislation as mentioned above (p. 49): the death penalty, for instance, in the case of a husband selling his wife; the confiscation of his property for exercising his power of divorce wantonly or for other than specified offences—half going to the wife, half to the temple of Demeter²⁹.

Council of family or neighbours. We occasionally find, in early Roman history or legend, an apparent half obligation to refer some cases, of extreme exercise of the potestas, to the five nearest male neighbours, or to a court of The last have been regarded as precursors of, or identical with, a Roman family council, resembling, somewhat remotely, the present continental conseil de famille30. But the doubtful character of an original institution, or customary rule, of this kind, may be inferred inter alia from the obviously varying interpretation given to the words propingui and the like, which sometimes apparently mean neighbours, sometimes friends, sometimes relations in the most general sense³¹. The last was, no doubt, the view taken in some pedantic or fantastic revivals of the supposed ancient domestic council³². It is indicated in Ulpian's expression consilium necessariorum33, where however the general idea of advice of relatives seems all that is meant. Instances will be cited more particularly below. I would, however, remark at present that there does not appear to be any clear evidence of any particular connexion between these limitations of parental authority and the gens (see § 5, p. 156).

²⁹ Plutarch, Romulus, c. 22, quoted below, n. 184.

³⁰ Code Civil, § 405. See Muirhead², pp. 35, n. 44, and 210: Msr.³ i. 308. Compare too the Welsh *Henaduron*, or Elders of the Kindred, who act as Coadjutors of the "Chief of Kindred," Seebohm, T. S. p. 72. See § 8, nn. 5 and 35.

³¹ See note 30: Val. Max. 2. 9. 2; 5. 8. 2: and Dionysius, 2. 15, 25: also below, § 4, p. 123.

³² Tac. Ann. 13. 32.

It was more probably in the pure option of the paterfamilias whether he chose to take or ask any advice at all, as to the exercise of his rights: and, if an outrageous exercise of them was subject to any effective check, it would be rather from the common feeling and probable action of some surrounding semi-social body generally, such as is represented in its extreme form by the devotio referred to above (p. 52). In point of fact, all our traditions of this nascent Criminal Law point to sanctions neither of gens, nor of individual curia, but of a larger and looser association, approximating, though very remotely, to a political society or State³⁴. Sovereign element of a State proper I myself take to have been developed at Rome out of a Sacerdotal presidence, which gave a definite fixation to the primeval customs and sanctions forming the foundation of the early family relations themselves (see below, §§ 11, 14).

Limitation by public office of son. As regards public position, it would appear by an anecdote which Cicero quotes from the time of the second Punic War³⁵ that the son, in such position, stood, at that time, on a level with the father. Jhering³⁶ concludes that, from the first, a distinction is to be drawn, between the absolute positions of the son and the slave, and their relative positions to the paterfamilias, the latter being practically the same. I am inclined to think that there was an early time when the distinction in question was, for all purposes, nil, and when the competence of a filius familias in potestate, to hold office, did not exist. We must remember, however, that the extreme patria potestas began to be legally limited as early as the Twelve Tables and it is possible that the son in power gained some sort of independent recognition either in the original Servian

³⁴ Below, § 6, pp. 244, 245: also Mommsen, Sr. i. 308.

³⁵ Cicero, de Inventione, 2. 17. 52.

³⁶ Jhering, Geist⁴, ii. p. 183.

registration³⁷, which was primarily for *military* purposes, or in the recognition of that registration by the Decemviral Code³⁸. At present, however, I must return to the consideration of the original *potestas* in more detail.

Power of life and death. It is desirable to take the case of actual children in potestate first, and separate from that of the wife in manu, because of several important modifications in the condition of the latter, though she was in Roman theory considered as a daughter to her husband, and the son's wife as a granddaughter (see below, p. 65).

Exposure of infants. This practice—equivalent to destruction—is traditionally represented as forbidden by Romulus for sons and first-born daughters, except in the case of deformity or monstrosity. Such cases were, however, to be submitted to the consideration of the five nearest male neighbours³⁹. After the attainment of three years, the father's power of life and death appears to have been unlimited. The rationale of these customary distinctions (attributed to the usual traditional legislator) is correctly given by Cuq, though he does not seem justified, on the strength of the inhuman practice surviving in the Republic (see next page), in saying that the Twelve Tables cannot have reproduced this modification of the practice of infanti-

³⁷ See Festus, P. p. 66, *Duicensus*, with Müller's note, and below, § 16, p. 487: Mommsen, Sr.³ ii. 408, n. 2. For the general subject of this paragraph, below, p. 90.

³⁸ I cannot understand the paradoxical opinion attributed by Karlowa (ii. p. 234) to Schmidt, that the *object* of the provision as to the three sales was an *extension* of the father's power.

³⁹ Dionysius, 2. 15. (δ 'Ρωμύλος) εἰς ἀνάγκην κατέστησε τοὺς οἰκήτορας αὐτῆς (τῆς πόλεως) ἄπασαν ἄρρενα γενεἀν ἐκτρέφειν καὶ θυγατέρων τὰς πρωτογόνους, ἀποκτιννύναι δὲ μηδὲν τῶν γεννωμένων νεώτερον τριετοῦς πλὴν εἶ τι γένοιτο παιδίον ἀνάπηρον ἢ τέρας εὐθὺς ἀπὸ γονῆς. ταῦτα δ' οὐκ ἐκώλυσεν ἐκτιθέναι τοὺς γειναμένους ἐπιδείξωντας πρότερον πέντε ἀνδράσι τοῖς ἔγγιστα οἰκοῦσιν ἐὰν κάκείνοις συνδοκῆ· κατὰ δὲ τῶν μὴ πειθομένων τῷ νόμιῳ ζημίας ὥρισεν ἄλλας τε καὶ τῆς οὐσίας αὐτῶν τὴν ἡμίσειαν είναι δημοσίαν.

cide by the legendary Romulus⁴⁰. The Twelve Tables, according to Cicero, provide specially for the ablegatio or despatch of a deformed male child⁴¹. He does not quote the words of the Statute, for which the term ablegatio seems a late one. All that we can reasonably conclude is that the Code contained some recognition or regulation of a barbarous custom, originally conceived in very general terms⁴². For the continuing power over the son in Cicero's own time see his account of Clodius' adoption⁴³.

The exposure of female infants can scarcely have been looked on with much disapproval, still less legally prohibited, even in the time of Terence, to judge from a passage in one of his most well-known plays, unless we are to take such plays as purely descriptive of supposed Greek manners⁴⁴. For the binding, scourging and putting to death of older children⁴⁵ we have, not only the traditional Royal legislation, but repeated instances in the historical period, which can scarcely be all false, though they do occur with suspicious frequency in one particular gens⁴⁶.

The infliction of such penalties is sometimes treated by our authorities as judicial. A council, too, of relatives and

⁴⁰ Cuq, i. pp. 158, 159. See his reference in p. 159, n. 2, to the note on *Lactaria* in Festus, P. p. 118, where, in spite of Müller, I much prefer the conjecture describant to the Ms. deferebant.

⁴¹ Cicero, de legibus, 3. 8. 19. Deinde, cum esset cito ablegatus, tanquam ex xii tabulis insignis ad deformitatem puer &c.

⁴² See the difficulty raised by Papinian (Collatio, 4. 8), in comparing the particularity of the *lex Julia de adulteriis* with the brevity of the supposed *lex regia* of Romulus.

⁴³ Cicero, de domo, 29. 77.

⁴⁴ Terence, Hautontim. 4. 1. 13-17.

⁴⁵ Dionysius, 2. 26. ὁ δὲ τῶν 'Ρωμαίων νομοθέτης ἄπασαν ὡς εἰπεῖν ἔδωκεν ἐξουσίαν πατρὶ καθ' υἰοῦ, καὶ παρὰ πάντα τὸν τοῦ βιοῦ χρόνον, ἐάν τε εἴργειν ἐάν τε μαστιγοῦν ἐάν τε δέσμιον ἐπὶ τῶν κατ' ἀγρὸν ἔργων κατέχειν ἐάν τε ἀποκτιννύναι προαιρῆται.

⁴⁶ Cicero, de Rep. 2. 35. 60, as to Sp. Cassius' execution by his father: Livy, 7. 4, as to L. Manlius Imperiosus; 8. 6, 7, as to T. Manlius, L. F.; 54, Epit. as to T. Manlius Torquatus.

friends, in the case of Sp. Cassius, of the whole Senate in that of D. Silanus, is reported by Valerius Maximus⁴⁷, as called together for this purpose. In the story of Horatius, a typical case which I shall have to notice repeatedly hereafter, a prior domestic jurisdiction over the case of sistermurder is clearly claimed for the father⁴⁸. There is, however, no security to the public for this jurisdiction being exercised, nor, when exercised, is it any bar to a public trial. In fact, apart from the extremely suspicious appearance of these stories, the alleged proceedings are obviously dependent upon the irresponsible will of the paterfamilias, in whose option it lies to take any proceedings at all: of any parental judicative properly so called I agree with Mommsen that there is not a trace to be found⁴⁹.

Sale. A father's power of selling his children appears to have been traditionally conceived as at one time unlimited. Dionysius alleges, as an instance of the extent of this power, the provision as to the three sales, which Ulpian professes to quote verbatim from the Twelve Tables⁵⁰; but which he himself (Dionysius) attributes to the original legislation of Romulus. The priority of this legislation he proves by a law of Rome's second mythical legislator (Numa) which enacts that where a father has allowed his son to contract the solemn marriage of confarreatio (below, p. 77) his power of sale should cease⁵¹.

This may be regarded as a necessary amelioration, by custom, of a very hard old rule. It was perhaps even more

⁴⁷ Valerius Maximus, 5. 8. 2. See also 2. 9. 2.

⁴⁸ Livy, 1. 26. See Zumpt, Crim. Recht Rom. i. 7, p. 91.

⁴⁹ Mommsen, Hist. (Dickson, 1901), i. ch. 11, p. 190 : cf. below, pp. 60-62.

⁵⁰ Dionysius, 2. 27. Ulpian, 10. 1.

⁵¹ Dionysius, ib. ἐν οἰς (so. τοῖς τοῦ Νομᾶ νόμοις) οὔτος γέγραπται, ἐὰν πατὴρ υἰῷ συγχωρήση γυναῖκα ἀγαγέσθαι κοινωνὸν ἐσομένην ἰερῶν τε καὶ χρημάτων κατὰ τοὺς νόμους, μηκέτι τὴν ἐξουσίαν εἶναι τῷ πατρὶ πωλεῖν τὸν υἰόν. For says Plutarch (Numa, c. 17) δεινὸν ἡγεῖτο τὴν ὡς ἐλευθέρῳ γεγαμημένην γυναῖκα δούλω συνοικεῖν.

obviously necessary that a woman who passed under the power of a husband, or his father, should pass out of that of her own (below, pp. 73 sqq.).

Noxal surrender of children. The right of sale, and the general power over life and death, naturally cover the application of an ancient customary rule, the partial survival of which, to a comparatively late period, seems so strange and barbarous in Roman law. I mean the custom by which the Head of a family might clear himself from the injurious act of any of that family by making over the offending creature bodily, to the person injured, "noxae," in lieu of payment for the damage or offence⁵². The clause in the Twelve Tables, from which the parts relating to slaves and quadrupeds are quoted by Ulpian⁵³ only speaks of the constitution or recognition of noxal actions, but does not exclude—in fact rather assumes—the existence of a previous practice of noxal surrender. The whole of this subject, however, will be more fully treated hereafter.

There does not appear any reason to question the primeval antiquity of a father's power, to sell his children, in the fact of such sale being subsequently recognised as completed by mancipation, to which act-in-law a certain mode of attestation was made essential, in all probability as part of the "Servian" reform. The physical form of mancipium may have existed perfectly well before the five witnesses were required: if it did not, some similar mode of conveyance must^{53a}. Neither is there any ground for assuming that noxal surrender of children was introduced by "Servius" because mancipation is recognised as the means of its being carried out⁵⁴.

⁵² For a wider application of the principle see Livy's story (8. 39) of the Samnites surrendering Brutulus' dead body to the Romans and compare Gaius, 4. 80, 81 (Poste, 4th ed. pp. 523, 524; K. and S.⁵ pp. lx, lxi and 176)

⁵⁸ Ulpian, Dig. 9. 1. 1. pr.; 9. 4. 2. 1.

⁵⁵⁸ See Gaius, 1. 119, for the form of mancipatio. The arguments for the connexion of this form with the Servian system must be considered later on.

⁶⁴ Gaius, 4. 79.

For later restrictions of this particular jus vendendi see generally Salkowski, Institutionen⁸, pp. 163, 164.

Slaves. The case of the slave is, in the historical period, and almost to the end of the Imperial period, of Roman Law, that of little more than a mere chattel. Everything that has been said of the child in old family law, applies à fortiori to him. In early times, it is true, the slave may have been treated rather more as a "member of the family," in the modern sense of that phrase⁵⁵: but this would be due to the homelier life, and the greater value placed upon the few human chattels, rather than to any recognition of right, or personal consideration. A little more indulgence, however, might possibly be enjoyed by the vernae, the "indwellers," or those born in the house^{55a}.

The influx of vast numbers of captives, by Rome's successive conquests, no doubt diminished the individual's value and increased the severity with which slaves were treated. We see proof enough of this, in the plays of Plautus⁵⁶.

The introduction of the theory of a Law of Nature may have led to the few ameliorations in the slave's condition, mediately through individual humane Emperors⁵⁷, though these modifications of the old barbarity have, in my opinion, been over-rated, and were possibly intended rather in the interest of the master than of the slave⁵⁸. As my subject at present is the family proper, or in the modern sense, I do not mean here or hereafter to devote much space to the condition of slavery or the modes of escaping from it; the

⁵⁵ Maine, A. L. ch. v. pp. 164, 165: Muirhead, p. 34: and above, p. 54.
^{55a} Corssen², i. p. 232: Curtius⁵, p. 207.

See Roby, Introduction, &c., pp. 128, 129: Gaius on *Dediticii*, 1. 14, 15.

⁸⁷ Maine, A. L. as cited in n. 55.

⁵⁸ For these modifications see Moyle, Instt. Just. 5 pp. 110 sqq.: Buckland, Slavery, pp. 36—38.

late legislation which practically absorbs Gaius, 1. 12—47, will merely be taken here, where it arises, as a limitation upon the powers of a master; and the old modes of manumission will be dismissed with a few words on the occasions to which they are referred by our authorities⁵⁸a.

Family property. The position of a quasi-trustee or even of a mere joint-owner is sometimes attributed by modern writers to the original paterfamilias, in regard to what is termed the "property of the family." I do not find sufficient evidence to support this view, in times of which we have any record, and consider it still less probable for earlier. But the doubtful inferences which may be drawn from the old words herus and heredium will have to be considered hereafter, under the latter word (§ 4, pp. 106, 107). At present I must be allowed to regard the position of the old Roman paterfamilias towards the "family property," with respect, at any rate, to alienation inter vivos, as that of absolute ownership⁵⁹.

Parallels to the Roman Potestas. Sir Henry Maine's criticism of Gaius, and Mr M'Lennan's counter-criticism of Sir Henry Maine, with regard to the Roman patria potestas, have been referred to above (p. 50). This power was, as we see, considered by the Roman Jurist to be almost unique. He only recognises something similar in the case of certain Galatae⁶⁰. These are considered by Maine to be the Asiatic Galatae, to whom St Paul wrote⁶¹, and words of the Epistle (4. 1) are often quoted as referring to Roman law. This they probably do, but, as it seems to me, rather to the law

 ⁵⁸a Testamento, § 14, p. 448: Censu, § 16, p. 488: Vindicta, § 20, p. 620.
 ⁵⁹ As to the argument, to this effect, from the word patrimonium see Jurisprudence, ii. pp. 547, 548: for the application of this word as private Property generally, ib. p. 574.

⁶⁰ Gaius, 1. 55.

⁶¹ As to the exact meaning of Galatia, see Lightfoot's Galatians, pp. 18, 19.

of tutela than of patria potestas⁶². As to the latter, I venture, with deference, to suggest that Gaius is more likely to have had in his mind the Gauls of Europe, of whom Caesar writes in his Commentaries⁶³. An indestructible right in the Roman heir presumptive (if St Paul had Roman law in his mind) might perhaps have been vaguely inferred from the passage in Galatians. That passage is only quoted here with regard to his present assimilation, as a chattel, to the slave.

To pass, however, to cases quoted by modern writers, we are told by Von Maurer that "in the old Teutonic cultivating community, each family in the township was governed by its own free head or paterfamilias. The precinct of the family dwelling-house could be entered by nobody but himself, not even by the officers of the law, for he himself made law within and enforced law made without⁶⁴." This strong statement, evidently drawn directly as a parallel to the Roman case, is not discussed by M'Lennan: but that the absolute authority, attributed to the paterfamilias in the "old cultivating community," must be considerably qualified, would appear from the cautious remarks of Stubbs and Maitland⁶⁵.

A stronger parallel, on Sir Henry Maine's side of the argument, is to be found in the present condition of the Indian villagers described by him. "The separate households each despotically governed by its family chief, and never trespassed upon by the footstep of any person of different

 $^{^{62}}$ ἐφ' ὅσον χρόνον ὁ κληρονόμος νήπιος ἐστιν, οὐδὲν διαφέρει δούλου κύριος πάντων ὧν κ.τ.λ. Compare Gaius on the capacity, or incapacity, of the pupillus, 1. 142, 144; 3. 107, 109.

⁶³ De Bello Gallico, 6. 19. Viri in uxores sicuti in liberos vitae necisque habent potestatem. For a writer of Greek origin, Galatae is equally applicable to either Celtic race. See Polybius, 1. 6. 2; 2. 22. 6; 25. 4. 1.

⁶⁴ Quoted by Maine, V. C. p. 78.

⁶⁵ Stubbs, C. H. i. pp. 87, n. 2, 88: P. & M. ii. p. 435.

blood are all to be found there in practice." "There is no doubt that, at the present day, any attempt of the public lawgiver to intrude on the domain reserved to the legislative and judicial power of the paterfamilias causes the extremest scandal and disgust 66."

These and other passages to a similar effect from Maine's "Ancient Law" and "Early history of Institutions" are quoted and discussed by M'Lennan in the 6th chapter of his "Patriarchal Theory," to which I would refer the reader. He certainly gives, to my mind, very strong reasons for questioning the existence, among the Hindoos, of any parental power amounting to the Roman patria potestas, either as to persons or property.

Conclusion. This is all that need be said, at present, on the condition, per se, of potestas. A considerable amount of additional information is, however, to be found in the treatment of its Investitive and Divestitive Facts. this subject depends, as we shall see (below, p. 68) upon quite late enactment, and is rather matter for works on the Private Law of Rome in detail than for a historical sketch of its development as a whole.

Here, as elsewhere, Gaius is to be supplemented by other works archaeological or philological. His own object appears to have been to give, in the Institutes, not so much a history of this department of Roman Law, as a Manual for beginners, with notes and explanations, mainly historical.

A supposed general plan of his first Book (with which alone I am at present concerned) was given above (pp. 47, 48): but the imperfect and irregular manner in which that, or any, plan is carried out has been repeatedly commented on by modern Jurists⁶⁷.

Many rules of law, having an important bearing on the

⁶⁶ Maine, V. C. pp. 113, 115.

⁶⁷ See Jurisprudence, ii. p. 472, and Austin's Lectures, 40-44 passim.

original elements of the Roman Polity, had become obsolete in the time of Justinian, and are therefore omitted in his Institutes. Some points, however, of importance, from Gaius' more practical treatise, the Res Cottidianae⁶⁸, are preserved by the Emperor, who combined the two earlier works in his own Educational Manual.

Justae nuptiae. With characteristic Roman unsentimentality, Gaius regards marriage simply from Napoleon's point of view⁶⁹. From his statement of potestas over liberi being an institution peculiar to Roman citizens, he proceeds to justae nuptiae as a sort of Investitive Fact, expressly as the means of producing such liberi⁷⁰. I propose however to treat substantively here, of a subject so important, which fills almost a third of Gaius' first Book, and has to do with some of the oldest forms of Roman Private Law.

The subject of a woman, who was in the full power of her husband, known as *manus*, has been to a certain extent anticipated in speaking of *children*, from the Roman view which regarded her in the light of a daughter⁷¹. I have here however first to speak of marriage generally: of *manus* hereafter (p. 73).

Justae nuptiae, generally and naturally translated lawful wedlock, means of course marriage recognised by Roman law: civil, as the adjective is translated by Muirhead (Gaius, p. 31) is perhaps a little misleading. To this recognition certain conditions are essential.

1. Non-relationship. The parties must not be within certain degrees of relationship to one another: in the case of direct ascent and descent, ad infinitum: the relationship is

⁶⁸ Jurisprudence, p. 579; Sources, p. 125.

⁶⁹ See the case of Sp. Carvilius (below, p. 98).

⁷⁰ Gaius, 1. 55, 56. *Liberi*, however, in this connexion with *potestas* must be taken to comprehend all descendants through males (Just. 1. 9. 3 from Ulpian, Dig. 1. 6. 4).

⁷¹ Gaius, 2, 159.

also taken into account even where artificially produced, as the result of adoption⁷². Of people so related the union is regarded as "nefarious and incestuous"; the woman is not considered to be the man's *uxor* at all, nor the offspring his children. Of course they are not in his *potestas*: they have no father, but follow the condition of their mother⁷³. Collateral relatives are subject to similar restrictions but not so stringent⁷⁴.

The incestuous unions referred to are spoken of by Paulus as condemned jure gentium by the common law of the world, or universal consent⁷⁵. The conception involved in the well-known phrase thus translated is a late one, dating from the latter part of the Republic, but the general idea of naturally prohibited marriages is old enough in most nations of our stock. Such unions have no doubt been proved, by recent anthropological enquiry, to have existed in other races, perhaps even in previous stages of the Latin one. I have however suggested above (§ 2) various reasons for believing that any such stage was passed before the earliest beginning of anything like Roman nationality; although my arguments were principally directed to the establishment of Monandry, as fundamental, in the beginnings of Rome.

That of Monogyny is also asserted by Gaius in the same sentence. This assertion is made, in his casual way, merely as ancillary to a statement about marriages incestuous by special Roman law. I think, however, it is intended to be general, and must not be considered to be qualified by the peculiar case of the Imperial veterani, who were allowed

⁷² Gaius, 1. 59: Ulp. 5. 6. ⁷³ Gaius 1. 64. ⁷⁴ Ib. 60.

⁷⁵ Dig. 23. 2. 68. On affinitas see below, § 4, p. 124.

⁷⁶ Gaius, 1. 63. The affinitas of these cases is to be contrasted with marriage with an ascendant or descendant, which is incest jure gentium. Paulus, Dig. 23. 2. 68: see above.

conubium with the first wives, otherwise civilly unqualified for it, whom they married after their discharge. Any purported marriage of a soldier, with more of such persons, was probably not considered a Roman marriage at all, so that the question of bigamy does not arise. The idea of recognising some positive principle of marriage (see below, p. 86) as juris gentium, or universal, would certainly not occur to the Romans of the regal period: the form of nuptiae pure and simple is considered below (p. 70).

Other obviously reasonable conditions, as of puberty and consent of parents⁷⁸, seem to have been assumed as generally primeval or natural.

Outside, however, of the patently "incestuous" unions, the degree of relationship, which was an obstacle to marriage in Roman law or custom, appears to have varied at different times. According to a questionable Epitome of Livy's 20th Book (c. 240—220 B.C.) recovered by Krüger⁷⁹, marriage intra septimum cognationis gradum was regarded as an innovation in the 3rd century B.C. That of first cousins (fourth grade) was according to Plutarch⁸⁰ once matter of accusation, but legitimatised by a vote of the people, which probably means a plebiscitum. No date is given, but these marriages were clearly allowable in the 2nd century B.C. as is shewn by Livy's speech of Sp. Ligustinus delivered in 17181. It may be doubted whether the prohibited area was ever larger than that of the jus osculi, which Polybius makes to extend, by ancient Roman custom, έως εξανεψίων⁸². The arguments used for Claudius' marriage with Agrippina, his niece, are given in Tac. Ann. 12. 6.

⁷⁷ Gaius, 1. 57. See for an instance, the soldiers' diploma, quoting a constitution of Vespasian, 76 A.D. Bruns', i. pp. 275, 276.

⁷⁸ Inst. 1. 10. pr.: Ulpian, 5. 2. ⁷⁹ Hermes, iv. pp. 371—373.

⁸⁰ Quaestt. Rom. 6. 81 Livy, 42. 34.

^{*2} Tr. filii consobrinorum, Polybius, 6. 2. 6. See Muirhead², p. 26, nn. 7, 8, and Cod. Just. 5. 4. 17, 19.

2. There must be conubium, or right of intermarriage, between the parties^{82a}, a matter independent of natural conditions, and defined by Ulpian, from the man's side, as power to marry a woman according to (Roman) law83. of course excluded persons of servile condition, and, originally, of any alien nationality84. Grants of conubium to other nationalities, as well as the recognition of imperfect citizenship or semi-servile condition, within the Roman State, come much later than the early times which we are now considering: and the complications resulting from the latter, as well as from intercourse with foreign States, which had not conubium, follow at considerable length in Gaius, à propos of the question whether the offspring of these mixed unions were or were not in the Roman patria potestas. All this is omitted in Justinian, no doubt as becoming meaningless after the general constitution of Caracalla, which conferred Roman citizenship on every free subject in the Roman world85.

In the beginning, after making all allowance for the dramatic fables of our historians, we must see that this right of *conubium* was of a very restricted character. It is held by Jhering to have once only existed as between members of "the gentile state," which he considers to be originally purely patrician⁸⁶. The subject of Patricians and Plebeians will be specially considered in a later section (7) but must be a little anticipated here.

It is fairly clear that perfectly free conubium must at any rate have been early established between Patrician and Patrician (see next page). It is clearer still that the same right of union, as between Patrician and Plebeian, was of questionable and contested legality, up to the time of the

⁸²a Ga. 1. 56, 59. 82 Ulpian, 5. 3. 84 Ib. 4, 5.

^{85 211-217} A.D. See Digest, 1. 5. 17.

⁶⁶ Geist⁵, i. p. 197. His view is adopted by Muirhead, pp. 26, 112 nn. As to its being "extended by special treaty or grant to allied nations," see above.

Decemviri, by whom it was definitely abolished⁸⁷. Such an enactment can scarcely have been a new idea. It certainly looks more like the attempt to erect, into statute law, a customary barrier which was beginning to crumble away. According to our traditional or semi-historical accounts, this Decemviral prohibition was in its turn repealed in B.C. 445 by the rogation or plebiscitum of Canuleius⁸⁸. The whole account, so far as particular facts are concerned, is apparently treated as purely fabulous by Pais⁸⁹.

It is possible that there may have been an earlier time still, when no marriage of a woman out of her *gens* was allowed, at least out of patrician *gentes*, without something equivalent to a private Act of Parliament⁹⁰.

On the hypothetical relationship between parties belonging to the same gens I have to speak in the section (5) devoted to that subject. I do not find any satisfactory evidence that such relationship, or, à fortiori, a connexion by the wider community of tribe, was ever regarded at Rome as an obstacle to intermarriage. In other words I cannot, in Roman history or tradition, find any survival of an original state of Exogamy, such as is suggested by M'Lennan and others⁹¹.

To return, for a moment, to the subject, which I have been obliged to anticipate, of the two Roman Orders, as to Conubium between Plebeians. That the Plebeians were ever, even before the Servian reform, not reckoned as citizens at all⁹², seems to me very improbable: still more so that they had no conubium between themselves, that their unions were not reckoned in the eye of the law as regular marriages, or

⁸⁷ Dionysius, 10. 60: Cicero, de Rep. 2. 37. 63, &c.

⁸⁸ See, besides the passages quoted in n. 87, Livy, 4. 4. 6.

⁸⁹ Storia, i. p. 568.

⁹⁰ See, however, § 5, p. 150 on enuptio gentis.

⁹¹ M'Lennan, P. T. p. 207.

⁹² As Muirhead holds, pp. 34, 35.

their offspring as legitimate; all of which points are maintained by respectable modern authorities. The existence of marriage, potestas and manus, among the plebeians, is admitted by Muirhead⁹³ as possible de facto, from the earliest times, and I cannot but believe that such existence was as early recognised by judicial authority, at least as to marriage and potestas.

A general statement of the law of *conubium* after the *lex Canuleia*, or the reform which passed by that name, may be taken from Ulpian⁹⁴, though it must be remembered that it is both modified and complicated by the legislation of the Imperial times in which he wrote.

Roman citizens had of course, by common law, conubium with Roman citizens: with peregrini and latini, only if expressly allowed by treaty or statute. Where conubium intervened, the children were justi (legitimate) and followed the father's condition: whether they were in his power or not depended on that condition, i.e. whether he was or was not a Roman citizen 95. Where there was not conubium the children followed the condition of the mother, with this special exception, that, if she were of the higher, the lower condition of the father attached to them 96. Apart from this, the enactments, by which the original simple principles were modified, are on the whole rather in favour of liberality in extension of Roman citizenship. They are not in question here, where we are treating of the origines of Roman Law, and have indeed little interest for the general student, in view of their determination by the sweeping grant of Caracalla mentioned above, p. 68.

Form of nuptiae. The conception of some general principle of marriage is, as has been pointed out (p. 67) late, and alien from the ideas of the primitive Romans, who

⁹⁸ History², p. 35.

⁹⁵ Ulp. 5. 8.

⁹⁴ Tit. 5.

⁹⁶ ib.; cf. Gaius, 1. 67, 76, 77, 80.

probably concerned themselves with little but externals. The forms proper to the entry into the married condition of manus will be specially considered below. Those, which we find in ancient existence, not necessarily relating to that condition, are few and simple.

Nuptiae (to omit all questions as to the meaning of the suffix and the number) indicates, as a word, merely the veil or hood with which the bride decked herself for the groom (nupsit viro). It may have been the ordinary head-dress of a girl, but of a special colour⁹⁷. This garb, together with her conduct to and reception in her new home (deductio or ductio) appears to be all that is strictly necessary to constitute nuptiae.

Sponsalia, betrothal, might no doubt be, in practice, a common preliminary. This proceeding, however, as signifying the previous agreement between the bride's father and the bridegroom, is mostly connected with dos, and can scarcely belong to the earlier times. The view accepted here as to sponsio is that it did not originate merely as a preliminary to marriage, and that, whether the verb spondeo indicated the sanction of a religious ceremony, or merely a serious declaration of will, sponsio probably did not exist, as a legal contract, before the lex Poetelia of B.C. 32698. This however is a difficult question, the discussion of which must be postponed until the substantive treatment of that law.

⁹⁷ Flammeum, probably a joy dress of gay colour. For the fancy that it was an omen of lasting union because worn by the wife of a flamen, cui non licebat facere divortium, see Festus, P. p. 89, s.v.

³⁶ Meantime see on Spondere Festus, F. p. 329, and Varro, 6. 69—72, s.v. Of modern authorities, Jhering, i. p. 303, n. 211a and Leist, Graeco-Ital. Rg. pp. 468—470, favour the former view expressed above: Girard⁵, p. 486, n. 2, and Karlowa, ii. p. 699, the latter. Corssen's view, which, with all due respect, I consider absolutely untenable, differs entirely from either (Ausspr.² i. p. 479; Nachtr. pp. 112—114). With the same feeling for an old teacher, I must here rank after Corssen, Donaldson's sponte "by its own weight or inclination" (Varronianus, p. 375).

No proof of marriage by capture. In all this there is nothing indicative of violence: simply ceremony and consent. The very word *uxor* is agreed by two of our best etymologists to be the consenting or willing one⁹⁹. Such too is obviously the purport of the question and answer which were adopted, though possibly not originated, in the old marriage by coemptio (below, p. 81).

It cannot, however, be denied that many popular practices connected with marriage both in Rome and elsewhere 100 have been regarded as pointing to the origination of marriage in capture. I do not propose to discuss the general question, but shall confine myself to the Roman traditions or usages which have been mainly relied upon as evidence.

As to the story of the Rape of the Sabine women and its bearing on the original elements of the Roman Polity some remarks will be found later (§ 6, p. 245 and App. p. 253 and § 9, p. 321). Of the principal points of usage, which have been interpreted as pointing in the same direction, one¹⁰¹ may I think be fairly explained as merely symbolical of the overcoming of virginal modesty and childish love of home by masculine ardour. The other must be left, as having once had some mystical significance which had become unintelligible to the Romans themselves¹⁰².

⁶⁹ Corssen⁸, i. p. 171: Curtius⁵, p. 136: Fick is unintelligible or undecided. Compare his Wörterbuch, i.³ p. 629 with i.⁴ p. 546 and ii. p. 266: I can find nothing on *uxor* in Brugmann. Vaniček, on the whole, makes her *die liebende* (Etym. Wörterb. ii. p. 862).

¹⁰⁰ See Dargun on Raubehe generally and, in particular, pp. 100, 101.

¹⁰¹ Festus. F. p. 289. Rapi simulatur virgo ex gremio matris: aut, si ea non est, ex proxima necessitudine, cum ad virum traditur, quod videlicet ea res feliciter Romulo cessit. Müller's emendation to trahitur seems to me quite gratuitous.

¹⁰² Festus, P. p. 62. Caelibari hasta caput nubentis comebatur, quae in corpore gladiatoris stetisset abjecti occisique, ut, quemadmodum illa conjuncta fuerit cum corpore gladiatoris sic ipsa cum viro sit...vel quod

The actual modes, by which the condition of manus is stated to have been entered into, are, as we shall see, either a religious ceremony, in which there is no conceivable reference to violence, or a civil one, in which a voluntary and mutual "taking" has been clothed with the somewhat unromantic form of purchase (below, pp. 81, 82).

The attempt to define matrimonium or nuptiae generally, as irrespective of form, must be postponed till after the consideration of marriage sine manu (p. 86).

Adoption. After his long digression on nuptiae and conubium (1.58—96) Gaius concludes the subject of potestas, for the present, with its remaining Investitive Facts, the two forms of adoptio¹⁰³. Of these arrogatio falls to be considered, as an actio per populum, in the section on comitia curiata: the more ordinary form belongs to the subject of legal procedure, and will be taken under the head of vindicta or vindicare.

Manus. On the condition of manus Gaius has nothing, proceeding at once to its Investitive Facts. He only tells us that it is a principle of law peculiar to Roman citizens, like potestas: and that, unlike potestas, it is confined to females 104.

nuptiali jure imperio viri subiicitur nubens, quia hasta summa armorum et imperii est....

Paulus' first explanation is so far fetched and (for early times) so anachronous, that I can only take it to have been suggested by some strange supposed etymology. For the rest, he makes the spear an emblem of the husband's imperium over the bride, not of her capture. Jhering (i. p. 113, n. 19*) thinks the spear was the scissors (!) of the ancient Romans; with which neither Paulus' comebatur nor Arnobius' mulectur agrees particularly well. Plutarch's explanation (Quaestt. Rom. 87) is of the vaguest. The true one is possibly to be found (if ever) in the word caelibari. (I may add that I cannot accept the derivation of coelebs (or caelebs) from $\kappa otr\eta$ and $\lambda el\pi\omega$ (privo di talamo) given by Pianigiani s.v. Celibe.) Neither Ovid (Fasti, 2. 560) nor Arnobius (adv. gent. 2. 67) throws any real light on this custom.

¹⁰³ Gaius, 1. 97-107.

It has, however, been suggested by modern authors that the term, thus restricted by Gaius, may also have been used of the condition of slaves and free persons in potestas or mancipium (below, p. 87), both of whom are said manu mitti to be sent from or out of manus¹⁰⁵. In this supposed use, manus does not refer to the external form of enfranchisement, but is employed in the derived sense of power, which was certainly the meaning of the word as specialised for the case of women married in certain modes¹⁰⁶. In spite, however, of the high authority of Sir Henry Maine¹⁰⁷ I venture on the whole to prefer the former (external) explanation of the word as certainly the primary meaning of manus in manumissio, mancipium and emancipatio.

For details of the husband's power over his wife, we may, I think, take our traditional accounts of the earliest Roman period to refer mainly, in this respect, to wives in manu (see below, pp. 76 sqq.).

As regards punishment for domestic offences ¹⁰⁸, the same despotic control is apparently attributed to the husband as if he were actually the father of his wife. Adultery and wine drinking are grotesquely coupled by Dionysius among offences subject to penalties at the husband's discretion, with

 ^{1.05} Compare Ulpian, l. Instt. (Dig. 1. l. 4) with Gaius, l. 11, 138, &c.
 106 Gaius, l. 109. In manum autem feminae tantum conveniunt (see below, p. 180).

¹⁶⁷ Who, in E. H. p. 313, adheres to the opinion that "manus, or hand, was at first the sole general form for patriarchal power among the Romans, and became confined to one form of that power by a process of specialization easily observable in the history of language." (See however, below, p. 76 on mundium.) The external or physical meaning of manus in manumissic is clearly preferred by Moyle, Justinians, note on Instt. 1. 5. 1. The Emperor's own words at the beginning of this section (manui et potestati suppositus) are in favour of Maine's view.

¹⁰⁸ The significant term *Hauszucht*, domestic discipline, is employed by Sohm, Instt. (Ledlie)³, p. 477. As to the connexion of offences see below, p. 97, n. 184.

the slight check of kinsman assessors¹⁰⁹. Even this last formality is not observed by an Egnatius Metennus, who bludgeons his wife to death for taking a draught of wine from the cask—and is acquitted, according to Pliny's Natural History, by Romulus¹¹⁰. Tacitus records a revival of the ancient court of kinsmen, to sit as assessors on the offences of wives, at the instance of Nero, in the case of a lady accused of "foreign superstition¹¹¹." Whether this foreign superstition was, as Lipsius suggests, Christianity or not, the story is probable, and the court set in action by Nero's tyranny, which the husband was man enough to brave, was no doubt part of the current tradition of the time¹¹².

In one matter of custom, formerly attributed to the modern Briton, the old Roman marital power differed from the parental. One of the usual vouchers for antiquity—a law of Romulus—is referred to by Plutarch as enacting that the man who sold his wife was to be sacrificed to the infernal Gods¹¹³. Indeed, generally, the fact that manus is a decidedly specialised form of potestas (above, p. 74) may be indicated

¹⁰⁹ Dionysius, 2. 25. ἀμαρτάνουσα δέ τι δικαστήν τον ἀδικούμενον ἐλάμβανε καὶ τοῦ μεγέθους τῆς τιμωρίας κύριον. ταῦτα δὲ οἱ συγγενεῖς μετὰ τοῦ ἀνδρὸς ἐδίκαζον ἐν οῖς ἦν φθορὰ σώματος καὶ...εῖ τις οἶνον εὐρεθείη πιοῦσα γυνή. See above, p. 59.

¹¹⁰ Pliny, H. N. 14. 13. 89. Invenimus...Egnati Maetenni uxorem, quod vinum bibisset e dolio, interfectum fusti a marito, eumque caede a Romulo absolutum. I believe dolium is fictile: but vom fass gives the point of the story better—which is quantity.

¹¹¹ Tacitus, Ann. 13. 32. Pomponia Graecina...Plautio...nupta, ac superstitionis externae rea, mariti judicio permissa; isque prisco instituto propinquis coram de capite famaque conjugis cognovit et insontem nuntiavit. See Orelli's note.

¹¹² Mommsen, Str. p. 25, calls this a matter of custom, "allgemeine Gebrauch—nicht Gesetz." See also Msr.³ i. 308.

¹¹⁸ Plutarch, Romulus, c. 22. τον δ' ἀποδόμενον γυναϊκα θύεσθαι χθονίοις θεοῖς. See above, pp. 55, 59.

inter alia by the statement of Ulpian that the materfamilias is suae potestatis¹¹⁴.

Mundium. A whole chapter is devoted by Dargun to the consideration of Marriage with or without mundium among the early Lombard, Teutonic and Scandinavian peoples. This word has been considered to be derived from a cognate root with manus 115 and the latter has been compared with and illustrated by it. The idea of protection, which rather comes to the front in mundium, may perhaps be admitted as an argument by analogy for the modification above suggested, in manus, of the bare power or control which is more prominent in the idea of potestas 116. Under the different circumstances, and the distance in time, of manus and mundium, I doubt if this analogy can safely be pressed very far: but it certainly seems that in marriage without mundium as in the case of more irregular unions, the children followed the legal condition of the mother¹¹⁷. Of this, of course, a considerable point is made, in favour of an original Mutterrecht.

Investitive facts. Again following Gaius we come to the modes of entering into manus, with which I am obliged to couple the subject of marriage sine manu and to add a few words on the condition of a woman neither in potestas, nor manus, nor marriage sine manu.

Confarreatio. Of Gaius' three modes, by which a woman could enter into manus—usu, farreo and coemptione (1.110), usus must be regarded, on the principle stated by him in 2.51, as a complement of deficient or lacking mancipium, and will therefore be postponed to a consideration

¹¹⁴ Dig. 1. 6. 4. See however below, p. 80, note 126.

¹¹⁵ See Kluge, Etym. Wörterb. p. 244, s.v. Mund (2): Schmid, Gesetze der Angelsachsen, Glossar, s.v. Mündigkeit.

ne Dargun, pp. 29, &c. See above, p. 74.

¹¹⁷ See above, p. 66: but cf. Karlowa, ii. p. 166.

of the Servian reform. Coemptio, though not, perhaps, originally connected with the Servian purchase, has so many difficulties in our traditional accounts of it that it must be taken, somewhat at length, later on in the present section. For other reasons, then, besides its reputed older date, the comparatively simple confarreatio comes first for consideration. We have here only to note its very archaic features and the probability of its exclusively patrician use, at least in its origin. Its later history falls rather to be treated under the head of Divestitive Facts.

Its archaic character. This was a natural and evidently very ancient religious ceremony, which is described, with enthusiasm, by Dionysius, as being peculiarly old Roman, but in language by no means precluding the possible coexistence, even at Rome, of other modes of contracting matrimony¹¹⁸. The spouses, under priestly superintendence, partake together, or offer in joint sacrifice, a cake made of the rudest and earliest national food, symbolically sharing with one another the fundamental requisites of a joint household—fire and water—and the humble occupations of an ordinary country life¹¹⁹.

118 This appears indeed to be implied in his words γυναίκα γαμετὴν τὴν κατὰ γάμους ἰεροὺς συνελθοῦσαν ἀνδρὶ κ.τ.λ. Dionysius, 2. 25. The whole chapter is discussed at great length by Karlowa, ii. § 12.

no Servius, ad Georg. i. 31. per pontificem maximum et dialem flaminem per frugem et molam salsam conjungebantur; id. ad Aen. 4. 103. aqua et igni adhibitis. Cf. Ulpian, 9: Pliny, H. N. 18. 10: Horace, Odd. 3. 23. 20, &c. It must be remarked, however, that a more mystic signification has been given to several of these observances, and, sometimes, by the very writers to whom we owe our only information about them.

Servius for instance in his note on Aen. 4. 103 follows his statement of the adhibitio of fire and water with a very fanciful interpretation which is repeated inter alia in Plutarch's Quaestt. Rom. 1 (Jevons, p. 4 and Int. c). To Servius also is due (ad Aen. 4. 374) the peculiarly nasty feature of the bride and groom sitting down "in the grease and the gore of a freshly slaughtered sheep's fell" to which Jevons (Int. xeviii, xeix) professes to find a parallel in Hindoo or Finnish-Ugrian custom, and instances, in Greece, the purificatory or exorcistic use of the Zeus-fleece Διδι κώδιον. Now,

Probably confined to the patrician order. This is the general belief, though I do not know that there is any direct statement to that effect in a classical author, besides what may be inferred from oratorical passages such as that of Cicero¹²⁰ descanting on the various consequences which would result to Rome, from the failure of the higher order.

The ten witnesses mentioned by Gaius (1. 112) have been considered to represent the ten curiae in a Tribe, or the ten gentes in a curia, which belong to the first attempt at the organisation of a Roman constitution. This is, however, in itself one of the debated subjects to be considered hereafter (§ 9) and other explanations of the number are possible (§ 8, p. 291), of equal or greater antiquity. At all events, the special connexion of confarreatio with the office of rex sacrorum and the greater Flaminates (Gaius, l.c.), which were among the very last privileges retained by the patrician order, is in favour of the general belief. Mommsen indeed suggests that there may have been a time when, as between

for Rome, the joint seating of bride and groom on a fleece of wool (which in Servius refers to the flamen's marriage alone), is no doubt confirmed by Festus (P. p. 114. In pelle lanata), who extends the custom to new brides generally and gives the homely explanation favoured on the whole by Plutarch (Jevons, p. 50). But the newly slain sheep is a touch of Servius' own "ejus ovis quae hostia fuisset." This is apparently accepted by Karlowa (ii. p. 156) though somewhat irreconcileable with his view of the antiquity of confarreatio being evidenced by its unblutiges character, ib. p. 165. It is not supported by the passage which Jevons quotes from Suidas. says is that the fleeces of the animal sacrificed to Zeus were kept (φυλάσσουσι) and worn by, inter alios, the δαδούχος at Eleusis, or spread for the passage over them of the καθαιρόμενοι, who were as yet έναγεις or impure (βέβηλοι, αναγνοι). Hesychius adds a note about the καθαιρόμενοι standing on them with the left (the unlucky) foot. This use of the κώδια seems to correspond to that of the slippers in a mosque. But it has nothing to do with the ancient Roman marriage. I cannot find in Daremberg et Saglio. under confarreatio or matrimonium, any "representation" of the kind referred to by Jevons, p. xcix, note †.

Patricians, no marriage was considered regular, unless solemnised in this sacred form¹²¹.

Confarreatio obviously existed in the time of Gaius and Ulpian¹²², but had long, even then, become unpopular and unusual. The history, however, of its disuse, and the introduction of diffarreatio, is better treated in a later part of this section (p. 94). For the present I proceed to the more ordinary form by which manus was entered into.

Coemptio, though at first sight connected with, and accordingly dating from, the Servian system, has in it certain features pointing to a less formal and solemn union than confarreatio, but possibly as old as that ancient ceremony itself.

Matrimonium, Mater and Materfamilias. In speaking above of marriage pure and simple and marriage as specially recognised by Roman law (above, p. 65) I purposely avoided a term which, with us, and latterly with the Romans themselves, describes the married state generally, but evidently had once a more restricted meaning.

Matrimonium, on the analogy of such words as mercimonium, testimonium, patrimonium, vadimonium, &c. should mean the dealing or conduct, property or condition, of a mater. There is not here much to be made out of the latter word per se. It is part of the common heritage of the Indo-European races, meaning in its first use the measurer, manager or dispenser 123—an idea pointing, I may remark by

¹²¹ Msr. iii. 34, cf. Muirhead, p. 26. The statement of Boethius (in Topica, 3. 14) confarreatic solis pontificibus conveniebat is inaccurate, even for the time of Ulpian (see below, p. 95). Granted that "Pontiffs" might cover Flamens (see Festus, F. p. 185. Ordo sacerdotum) the exfarreatis might of Gaius, 1. 112 must surely require some wider use of confarreatic. Of course the patrician character of this marriage in no wise precludes the co-existence of a recognised legal union between Plebeians (see pp. 69, 70, 78).

¹²² Gaius, l.c.: Ulpian, 9: Boethius, l.c.

¹²³ Curtius, p. 333. See too Kluge, s.v. Mutter: Pianigiani, s.v. Madre, &c.

the way, to Monogyny as at least recognised by our Aryan forefathers. In the Roman matrimonium we may not unreasonably suppose that the mater intended is she who is specifically designated materfamilias.

The testimony as to the meaning of this word, as a legal term, is a little conflicting.

In Cicero's time materfamilias was said only of an uxor in manu124: for this statement he adduces the crucial evidence of an actual contested case. Aulus Gellius, in criticising a false view of Aelius Melissus endorses that of Cicero 125. Ulpian on the contrary in his Institutes speaks of matresfamilias as suae potestatis 126. In the same work, as quoted by Boethius, in his comment on the above cited passage of Cicero's Topica, Ulpian expressly excludes from the style of materfamilias those, who come into manus, usu or farreo, confining it to such as pass into that condition per coemptionem127. This last passage is somewhat startling. If any Roman wife specially held the position of materfamilias, we should have expected it to be held by one who had participated in the ancient and dignified act of confarreatio. Usus as we shall see presently (p. 83) was obsolete before Ulpian's time. It is in the details of coemptio that we are to find the solution of our difficulties.

¹²⁴ Cicero, Topica, 3. 14. Genus enim est uxor; ejus duae formae: una matrumfamilias [eae sunt quae in manum convenerunt]: altera earum quae tantummodo uxores habentur. I take the following case, of Fabia, to be a real one, not merely from the absence of the usual John Doe and Richard Roe (Titia or Maevia) phraseology, but from the perfect tense fuerit.

¹²⁵ Aulus Gellius, 18. 6. 9. Matremfamilias appellatam esse eam solam quae in mariti manu mancipioque...esset quonium, &c. We need not trouble with his reasoning, or the derivation of matrimonium and matrona from matris omine.

¹²⁶ Ulpian, Dig. 1. 6. 4; in Ulp. 4. 1 they are principes familiae like the pater.

¹²⁷ Boethius in Topica, 3. 14. quae...in manum per coemptionem convenerunt, eae matresfamilias vocabantur, quae vero usu vel farreo, minime.

Among the formalities with which this union was effected, Ulpian, in a passage quoted by Boethius, only specifies a mutual question and answer: by the man, would the woman be his materfamilias: by the woman, would the man be her paterfamilias; both answering in the affirmative ¹²⁸. There is obviously here an independence implied in the lady's words—as in the term materfamilias itself—very different from the conception of a Roman daughter (above, pp. 57, 65).

Ubi tu Gaius, &c. The same idea is, according to some, implied in the words ubi tu Gaius, ego Gaia, à propos of which we have Cicero's amusing comment on some pedantic lawyers of his day¹²⁹. They probably do not mean simply "Where you are Jack, I will be Jill," but, as Philemon Holland interprets them, "Where you are lord and master I will be lady and mistress¹³⁰." Indeed it is curious that in the first instance I can find of the word matrimonium¹³¹, the lady, who complains bitterly of her treatment in that state, not only gives unmistakeable evidence of her independent ideas, but calls upon her father to take her back home (see below, p. 83 and note 170). Finally, with reference to the difficulty which has naturally been found in the idea of a mutual purchase, it must be remembered that the verb emere does not mean originally to buy, but to

¹²⁸ Ulpian apud Boethium, l.c. Coemptio vero certis sollemnitatibus peragebatur, et sese in coemendo invicem interrogabant, vir ita an sibi mulier materfamilias esso vellet? illa respondebat velle. item mulier interrogabat an vir sibi paterfamilias esse vellet. ille respondebat velle. In these words I cannot see any sign of a gewaltunterworfenen Genossin which Karlowa gratuitously gives them, ii. p. 161.

¹²⁹ Pro Murena, 12. 27. Quia in alicujus libris exempli causa id nomen invenerant, putarunt omnes mulieres quae coemptionem facerent GAIAS vocari. Compare the case of our catechumens declaring themselves to be M. or N. I do not think Karlowa (ii. p. 157) is justified by Quintilian, 1. 7. 28, in attributing these homely words to confarreatio.

¹³⁰ Plutarch, Quaestt. Rom. 70 (Jevons, p. 49).

¹⁸¹ Plautus, Menaechmei, 4. 1. 1. She is evidently not in manu.

take¹³², and that the meaning of purchase, in our ordinary sense, is the result of a statutory or quasi-statutory regulation which we connect with what is generally considered part of the Servian legislation (see above, p. 60). Undoubtedly the proceedings, in coemptio, were regarded, in the time of the classical Jurists, as representing a purchase and sale¹³³ and did generally bring the lady into manus. But I venture to maintain that the passages of Ulpian and Boethius above referred to (p. 81), as well as that of Nonius to be noted shortly (n. 140), indicate traditions of an ancient marriage per verba de praesenti which, whether it made a woman a materfamilias or not, did not bring her into manus. It is of this condition—marriage sine manu—which ultimately became that of most Roman ladies, that I have finally to speak after a few words on the subject of usus.

Usus, in general Roman law, is the possession pro suo by which full legal ownership, in an article requiring mancipatio, is acquired by a transferee, although no mancipation has taken place¹³⁴. As applied to marriage at Rome, it means simple cohabitation, by which the woman passed into the manus of the man in one year¹³⁵, unless, in that year, she interrupted the use by three nights' absence¹³⁶, a provision stated by Gaius to come from the Twelve Tables. This

¹⁹² Festus, P. p. 76. Emere, quod nunc est mercari, antiqui accipiebant pro sumere. Cf. *abemito*, ib. p. 4. A similar change of meaning in the word *purchase* itself is one of the commonplaces of English Real Property Law.

¹³⁸ Gaius, 1.113, of the man buying the woman: Virg. Georg. 1.31. Teque sibi generum Tethys emat omnibus undis, of the mother-in-law buying the son-in-law. Servius in his note on this passage says, of *coemptio*, "se maritus et uxor invicem coemebant"; on Aen. 4. 103, "inter se quasiemptionem faciunt." On the whole question see the very full note B in App. to Muirhead³, pp. 413, 414.

¹³⁴ Gaius, 2. 42. For an entirely different view see Karlowa, ii. pp. 162, 163.

¹³⁵ Gaius, 2. 43: Cicero, Topica, 4. 23: Ulpian, 19. 8, &c.

¹³⁶ Gaius, 1. 111.

interruption of usucapion is occasionally called by the Jurists usurpatio 137.

Manus completed by usus existed in Cicero's time¹³⁸: when therefore Gaius tells us (1. 111) that it had become obsolete in his, he must, I think, mean that coemptio had practically ceased to be used matrimonii causa (see below, p. 85).

Marriage sine manu is distinctly recognised by the law of the Twelve Tables as above referred to (p. 82). The comparative independence of the position constituted, it is generally held 139, the attraction which rendered this the fashionable form of marriage in the later Republic and Empire. One point, however, of control, to which the lady remained subject, must be noted. Not passing into the manus of her husband, she remained in the potestas of her father. This is the point to which Nonius refers in the definition of materfamilias, for which he appears to have responsible or "reliable" authorities 140. The curious result—about which, however, there seems to be no doubt—was that, whatever her social position may have been, as consort of her husband, and joint ruler of his household, her father could originally, at his pleasure, dissolve even a happy union.

Father's potestas abducendi. Thus, in the comedies of the 2nd century B.C., the father's power abducendi uxorem a marito is clearly recognised, at the wife's request in one case (that cited on p. 81), but also against the wish of two sisters, spoken of as matresfamilias, in another 141. An out-

Paulus, Dig. 41. 3. 2: Aulus Gellius, 3. 2. 12, 13. The other, perhaps more ordinary, meaning is generally derived from usu-rapere.

¹³⁸ Pro Flacco (61 B.C.), 34, 84.

¹³⁹ See, however, Jhering, ii. pp. 190, 191.

¹⁴⁰ Nonius, p. 442. ...matremfamilias quae in familia mancipioque sit patria, etsi in mariti matrimonio esset. My former comment, therefore (E. R. L. p. 133, n. i) on this passage was mistaken and unjust.

¹⁴¹ Plautus, Stichus, 1. 2. 41.

rageous exercise of this power might possibly be checked by the Censor's disapproval, as that officer gradually acquired a substantial control over mores: but the general principle seems to have been maintained, as part of the potestas, down to the end of the juristic period. Diocletian and Maximian, it is true, in 293 A.D. refer to a constitution of the Emperor Marcus¹⁴² that a father who had once consented to a union of his filiafamilias with a husband to whom she was attached should not be allowed to revoke such consent without serious and just cause. But Ulpian, although he allows it to be certum jus in practice, that marriages of "good agreement" are not to be disturbed by the right of patria potestas, holds that this result must be effected by the persuading over of the father 143. It is only in the late Jurist, or book, called Hermogenianus, that we read of action against the father by the husband de uxore exhibenda et ducenda144. On the older Interdict competent to the father see Lenel, E. P. ed.2, § 262, p. 468, n. 5.

In view of the possibility of capricious or spiteful use, by the father, of his potestas in this case, we can see reason for a daughter's still preferring to enter into manus, although what is called by moderns "free" marriage undoubtedly became more the practice in later times. Other reasons for this will be found under the headings of divortium and tutela.

Perpetua tutela mulierum. A woman might of course be neither in manu nor in potestate, which was probably

¹⁴² Cod. 5. 17. 5. The words divus Marcus pater noster religiosissimus Imperator are so strange that they seem to me to indicate a quotation from a constitution of Marcus Aurelius referring to Pius, to whom Paulus in fact attributes what seems to be the same enactment (Sentt. 5. 6. 15). Religiosissimus probably does not mean anything but most tenacious of old customary law.

¹⁴⁸ Ulpian, Dig. 43. 30. 1. 5.

ib. § 2. On Hermogenianus see Sources, pp. 143, 144.

in the end a position of great independence. The amount, however, of such independence really enjoyed by a Roman woman in this position was originally very small, for she was, as we shall see, for her life long under the practical control of persons interested in the devolution of her property, without whose sanction she could neither marry nor perform any other act in law. On this old tutela I have to speak hereafter under the heads of agnati and gentiles (§§ 4, 5).

The Investitive Facts of marriage sine manu were probably, as to the essential conditions, much the same as those for marriage with manus, at least as to the first or negative class, subject to the slight variations noted above (pp. 67, 68): the positive requirements, from time to time made by the law of conubium, would also of course be, for a very considerable period, strictly followed, the idea of a matrimonium juris gentium being undoubtedly late. As to form, we know nothing with any certainty 145. The proceedings described above (p. 71) for nuptiae have the appearance of old custom, sufficing for a comparatively rude and unceremonious people. Those required for the creation of manus, on the other hand, are prescribed and elaborate. In the time of Cicero, and still more of the Classical Jurists, some of these forms were turned to uses never intended by their originators. Coemptio for instance may possibly have been still used to contract a "free" marriage (when entered into with the intended husband himself), even if expressed to be made, not matrimonii, but fiduciae, causa146. But apart from this expression, which might, one would suppose, be enough of itself to

¹⁴⁵ See Karlowa, ii. pp. 174, 175, 180. The rubric of the article of the Digest De ritu nuptiarum (23. 2), is a misnomer, the title being mostly taken up with considerations of *capacity*, or essential conditions.

¹⁴⁶ Gaius, l. 114. quae cum marito suo facit coemptionem, ut apud eum filiae loco sit, dicitur matrimonii causa fecisse coemptionem: quae vero alterius rei causa...aut cum viro suo aut cum extraneo...dicitur fiduciae causa fecisse coemptionem.

exclude any matrimonial result, the actual purposes, for which we find *coemptio fiduciaria* employed, do not seem to have anything to do with marriage *cum* or *sine manu*¹⁴⁷.

In cases which arise in the later jurisprudence, under the rule as to donatio inter virum et uxorem, it became important to determine what event constituted the moment of marriage—that sine manu being clearly the one contemplated. Cervidius Scaevola has a difficult passage on this subject 148, in which he appears to reject either the deductio domum or the signing of the tabulae149, as this moment. preferring that of actual cohabitation (? consummation, l.c. sec. 1) with mutual matrimonial intent¹⁵⁰. Here we arrive at perhaps the nearest to a conception of marriage generally or matrimonium juris gentium; though I question whether this expression is to be found in Roman Law¹⁵¹. The few attempted definitions of matrimonium do not come to much. They are either pious wishes, by no means in accordance with later Republican or Imperial practice, or the echo of obsolete traditional form. Thus Modestinus calls nuptiae the union of male and female, a sharing of lots in the whole life, a copartnership in right divine and human 152. This is substantially adopted by Justinian, who however omits the part which probably referred to confarreatio and inserts a sort of Christian deprecation of divorce 153.

¹⁴⁷ See Poste's Gaius⁴, pp. 71, 72.

¹⁴⁸ Dig. 24. 1. 66.

¹⁴⁹ Equivalent to our marriage settlement, except that it generally took place after the marriage, l.c.

¹⁵⁰ Such intent is presumed in all cases where the lady is a respectable free woman. Modestinus, Dig. 23. 2. 24.

¹⁵¹ See, however, Salkowski, Institutionen⁸, p. 149.

¹⁵² Dig. 23. 2. 1.

¹⁵⁸ Just. 1. 9. 1. Nuptiae autem sive matrimonium est viri et mulieris conjunctio, *individuam* consuetudinem vitae continens. On the general discouragement of divorce after the adoption of Christianity see Moyle⁵, pp. 130, 131: Cuq, ii. p 801: Salkowski⁸, pp. 156, 157: Gibbon, ch. 44 (Bury, iv. p. 481).

Conclusion. Here I must for the present conclude the subject of Roman marriage. It is in the Divestitive Facts of that institution (below, p. 91) that I find the strongest arguments in favour of the theory which I venture to set out more fully elsewhere (§ 6, pp. 233, 234; § 7, p. 255). So far, however, as we have gone I submit that, while the high antiquity of confarreatio and manus in general must be admitted, a marriage contracted sine manu, with rough country rites scarcely religious at all, and possibly containing the homely words ubi tu Gaius, &c. (above, p. 81) may be of quite equal or greater antiquity, though I demur to its being accompanied by any definite evidence of marriage by capture (above, p. 72).

Mancipium follows naturally enough, in Gaius' Institutes, directly after coemptio fiduciaria, with which it is so largely, though not exclusively connected 154. As correlated, or coordinated, with potestas and manus, mancipium means a condition recognised in Roman law, arising from mancipium meaning a conveyance, or mancipation, by one having potestas or manus over the person mancipated 155. Most of what Gaius has here to say belongs to the subject of form in mancipation, or to coemptio 156 though he has two or three stray sections, at the end of the division treating of persons alieni juris, on the condition of persons in mancipio and the modes in which they can leave that condition 157. It was one which though often employed as a legal fiction, was a condition strictly of bondage, but differing in many respects from servitus proper. The person in mancipio, while said to be servi loco, retained both civitas and libertas: his children do not, according to the opinion which ultimately prevailed,

¹⁵⁴ Mancipium begins with § 116, coemptio fiduciaria occupying §§ 114, 115: as a matter of general division, it follows manus, § 108; see § 49.

¹⁵⁵ On mancipium and mancipatio see App. II to § 16.

follow their father's condition; their legal rights being suspended until he either is manumitted or dies in mancipio: in the latter event they are independent or come into their grandfather's potestas, in the former into their father's 157a. Even he, while in mancipio, is not legally in the possession of the mancipatarius as his temporary owner is sometimes called (I think only by moderns). While therefore he stands, as regards proprietary acquisition in the same relation to the latter as a slave, it is doubtful whether he can acquire possession for him158. A distinction must also be drawn between persons in mancipio pure and simple, persons in mancipio dicis or fiduciae causa and persons in mancipio ex noxali causa. The first is the case of those simply sold by their father under his ancient potestas. These, if the generally accepted inference of Jhering, from the Decemviral enactment as to the three sales (Tab. 4.2), be true, could put an end to their condition of mancipium by entering themselves on the census roll at the arrival of the next lustrum 159.

In the second case, the condition of mancipation was only meant to be of very short duration, though long enough to prevent the proceedings becoming an absolute farce. This is the case in which the mancipatary, for purposes of emancipation, is called in the Epitome of Gaius (1. 6. 4), the fiduciarius pater. In these fiduciary arrangements the mancipatary was of course bound not to reconvey to any one but the person intended by the parties. It is to this and the first case that the prohibition of injurious treatment of the person in mancipio refers 159a.

¹⁵⁹ Gaius, 1. 140. Jhering, ii. p. 184, n. 274. He shews that otherwise the restriction of parental power to the three sales is meaningless. As to self-enrolment, Karlowa seems to me to deny it (i. p. 234) too broadly to any one who alieno juri subjicitur. Livy, 43. 14, only implies that this power was wanting to those qui in patris aut avi potestate essent.

¹⁵⁹a Gaius, 1. 141: see Paulus, Sentt. 2. 25. 2. Also Jhering 4, ii. p. 186, n. 277 and pp. 532, 533, nn. 690 and 691.

In the third case (ex noxali causa) the surrender would appear from the Autun fragment of Gaius, 4. 80, 81 to be, under the old law, a final matter, equivalent to putting the delinquent to death, so that there is no question as to his treatment in mancipio 160. With the exception of this barbarous right of surrender, which is treated as obsolete in the case of offending sons and daughters by Justinian 160a, the condition of mancipium was, in the time of Gaius, mainly nominal and of very brief duration, and possibly already becoming obsolete. The contract or fiduciary conveyance of nexus, which according to the view of some authorities, gave rise, amongst other causes, to this condition was, as to its personal character, gone in 323 B.C. (Livy, 8. 28). But this will be considered at length on the Twelve Tables (Tab. 6. 1).

Divestitive Facts. 1. Of potestas. This subject may be regarded either from the position of the person enjoying the power, or from that of those who are liberated from it. Gaius takes here rather the latter view. For the different modes of the manumission of slaves, with whom he begins, he refers to the earlier part of the first Book. These modes have been mentioned in the parts of Roman law to which they respectively belong: as we are now concerned with the family proper, they are omitted here (see above, p. 61). The facts divestitive of the family conditions above described have been to some extent anticipated, but there remains much which further illustrates the conditions themselves.

Natural or civil death. *Potestas* is ordinarily dissolved by the death of the father, the exception being the case where he himself was still in power¹⁶¹. The general fact that

¹⁶⁰ Aut. Gai. §§ 82 sqq.; Poste4, p. 524 and Kr. and Stud.5, p. lx.

¹⁶⁰a Just 4. 8. 7: see Ulpian, Dig. 5. 1. 57. Even in the time of Papinian if a freeman noxae deditus had acquired, for his surrenderee, as much as the damage for which he had been surrendered, the latter was compelled or ought to be compelled by the Praetor to manumit him, Collatio, 2. 3. 1.

this legal condition is proprium civium Romanorum (Gaius, 1. 55) governs the cases of dissolution by forfeiture of citizenship on the one side or the other 162, and suspension on capture by the enemy and restoration by the rule of reentrance (postliminium) 163.

Child's tenure of office. An exceptional case is a child's attainment of high religious office, which is probably a very ancient privilege¹⁶⁴. The extension of the same privilege (the religious offices referred to being mostly for life) to lay office, during tenure at least of the latter, is probably, as was suggested above (pp. 56, 57), a gradual affair, marching probably with the gradual throwing open of office to Plebeians, but still more due to the needs of increased power and responsibility, in the struggles for supremacy on a larger scale in which the adolescent Republic became engaged.

The first definite historical instance recorded is in 213 B.C. but it appears, from the language of the narrators, to have been an already recognised principle that "rules of public service rank above those of private duty^{164a}." It is only

¹⁶² Gaius, I. 128. On the exceptional case of relegatio see Just. 1. 12. 2; to ib. § 3 may be added the strange case mentioned Msr.³ iii. 47, n. 2 and the somewhat exceptional early Latin colonies (Ga. 1. 131), persons sent to which appear to have had the option of retaining their Roman citizenship on payment of a fine. Cicero, pro Caecina, 33. 98: Dionysius, 7. 13.

Postliminium is strictly return from capture. See the long quotation from Gallus Aelius in Festus, F. p. 218, s.v. It is often represented to be a coming behind, i.e. inside the threshold (frontier), but is, I think, better taken as a coming back from the space outside the threshold. See id. p. 250, s.v. Posimoerium, ad finem, and Varro, 5, § 143, p. 55. For an entirely different explanation, however, see Poste's Gaius, p. 80.

¹⁶⁴ Gaius, 1. 130, cf. Ulp. 10. 5. These actual cases disappear, of course, under a Christian Empire, from Justinian's Institutes. But see Nov. J. 81.

164a These words are from Valerius Maximus, 2. 2. 4. The story, of the older Fabius observing the respect due to his son, as Consul, is also told by Livy, 24. 44, and the more credible authority Claudius Quadrigarius (Gellius, 2. 2. 13: as to Claudius see Sources, p. 63, n. 119). For more general statements of the principle, by the Classical Jurists, see Pomponius, Dig. 1. 6. 9: Ulpian, Dig. 36. 1. 13. 5: Hermogenianus, ib. § 14, and Dig. 5. 1. 77, 78.

when titles of Republican office have become practically meaningless that Justinian lowers the rank of Senator and Consul beneath the late Imperial dignity of Patriciate¹⁶⁵.

Emancipatio and adoptio strictly so-called, as distinguished from arrogatio (above, p. 74), although they come in Gaius directly after these varied facts divestitive of potestas (1. §§ 132, 133, 134, 135), cannot well be adequately treated without some previous consideration of mancipatio fiduciaria, which, although somewhat anticipated above (p. 85) is, on the whole, treated here as resulting from practice sanctioned by the Twelve Tables, to which its substantive treatment will be postponed. I shall therefore content myself with repeating here the remark made above (p. 74) as to the meaning of the word manus in the compounds mancipium, emancipatio, &c.

2. Of manus. In the case of a woman coming into manus the potestas proper is divested, with the exception of the Flaminica Dialis 166. It would also appear from a partially illegible passage in Gaius 167 that coemptio freed women from patria potestas in all cases, whether effected matrimonii or fiduciae causa (see above, pp. 85, 86). This is due, it must be remarked, to an emendation of Krüger, which is however apparently accepted in the edition of Krüger and Studemund, and has the sanction of Huschke in point of effect, although he supplies the lacuna somewhat differently 168.

Marriage is the institution of which the Divestitive Facts throw the most light upon this particular feature in the

¹⁸⁵ Inst. Just. 1. 12. 4; as to the institution of this rank see C. Just. 12. 3. 3—5 and Nov. 81 Praef. and § 2.

¹⁶⁶ See below, p. 94, and Poste's Gaius4, p. 69.

¹⁶⁷ The latter part of 1.136. On the supplement of the beginning, no point arises.

¹⁶⁸ Krüger supplies the lacuna thus: [Coemptione autem facta mulieres omnimodo] potestate, &c., Huschke's suggestion was [eae vero mulieres quae in manum conveniunt per coemptionem] potestate, &c. which does not appear equally reconcileable with Gaius, 1. 114 (above, p. 85, n. 146).

early elements of Roman polity. In dealing with these facts, I propose, subject to the caution on p. 86 to give priority of notice to marriage *cum manu*, following the practice of most writers ancient and modern on Roman Private Law¹⁶⁹. There is however one general Divestitive Fact independent of the distinction just indicated.

Natural or civil death. Matrimonium in the sense of nuptiae simply (above, p. 71) including, that is, marriage either cum or sine manu, is stated generally by Paulus, to be dissolved by death, captivity or other servitude of either party 169a. To take the last case first: if either party become servus or serva poenae, this has the same effect as death, the principle being that a free person shall not remain tied to an unfree one. In the later law and practice of the Digest, this principle results in some rather intricate cases, which are complicated with the case law of dos and the later Republican or Imperial Statutes of Criminal Law. They are not properly within the early subjects to which I am at present confining myself but they throw some light upon the fundamental distinction of marriage cum or sine manu¹⁷⁰.

In case of the captivity of one of the parties, the marriage, if cum manu, appears to be merely suspended, and to revive

¹⁸⁹ Dionysius, in the well-known chapter 2. 25, clearly gives preference to *confarreatio*, though he does not necessarily regard it as the only original form of marriage at Rome (see p. 77, n. 118).

¹⁶⁹a Dig. 24, 2, 1,

¹⁷⁰ A married woman may become a serva poenae by a capitis damnatio (Msr. iii. p. 47, n. 2 and Mstr. p. 947). Under some statutes, however, inflicting this penalty, her dos is confiscated, under others not. In the latter case, it accrues to the profit (lucro cedit), i.e. becomes the absolute property, of the husband, she being considered as dead. In the former, according to Papinian, he has an action for it against the fiscus (Ulpian and Papinian, Dig. 48. 20. 3, 4, 5. pr.). But in the case of the wife's deportatio, as this does not reduce her to a servile condition, there is nothing to prevent the two mutually retaining the affectus matrimonii. Should the wife however wish to leave her husband, she being in this case understood to be a filiafamilias, i.e. not in manu, her father will bring his action against the

automatically by postliminium¹⁷¹. Most of the cases, however, treated in the Digest, are matter obviously of late law and refer to the free marriage, sine manu. This, it would seem, was by the earlier law of the juristic period, whether of practice or of statutory enactment, held to be dissolved¹⁷², and to require express renewal by consent of both parties¹⁷³. Some reasonable ground, however, for declining such renewal, seems to have been required, at least on the part of the wife¹⁷⁴.

Any intermediate subsistence of the marriage consisted merely according to Julian (still I imagine speaking of marriage sine manu) in the fact that a precipitate marriage of the non-captive party to another was distinctly discouraged: so much is clearly the general view in Hadrian's time indicated by Dig. 24. 2. 6. Whether the fixation of a definite term of delay, till either the death of the captive was ascertained, or 5 years had elapsed since the beginning of the captivity, was due to the Augustan period or to Justinian is matter of dispute¹⁷⁵. The first marriage was then considered to have been dissolved on amicable terms (bona gratia^{175a}) and without prejudice to the rights of either party (see generally Julian as cited above).

husband for the dos: if she is a materfamilias and suffers deportation during the marriage, the dos remains with her husband. If the marriage is afterwards dissolved, she is allowed a new (hodie) right of action for it, as a matter of indulgence (humanitatis intuitu). See C. Just. 5. 17. 1, 6. 25. 6, and generally Ulpian, Dig. 48. 20. 5. 1 (if the passage is unaltered).

¹⁷¹ Girard, p. 160. Pomponius, Dig. 49. 15. 14. 1, and Julian, Dig. 24. 2. 6, are against this, but the words consensu redintegratur matrimonium seem to confine the dictum of the former to free marriage. For Julian see next note.

¹⁷² This is arguendo from Julian's treatment of the freedwoman married to her patron (Dig. 23. 2. 45. 6) and the marriage subsisting, etiam in captivitate, as an exceptional case. See also the first sentence of Julian, Dig. 24. 2. 6.

¹⁷³ Tryphoninus, Dig. 49. 15. 12. 4, cf. Pomponius, ib. 14. 1.

¹⁷⁴ Paulus, Dig. 49. 15. 8.

¹⁷⁵ Girard, p. 161, n. 1: Karlowa, ii. p. 121. 178a Nov. 22, c. 7.

But it is in the cases where marriage is voluntarily dissolved that the most distinctive differences of the "free" union are the most clearly apparent.

Whatever theories or devices were Diffarreatio adopted in later times 176 I do not think that any one, reading the original account of confarreatio, can doubt that, in its fundamental conception, it was an indissoluble union for life 178a. An artificial dissolution of that union, while commending itself to the conveniences of a decadent society, or to legal ideas of symmetry 177 violates that fundamental principle. I am therefore disposed to put diffarreatio very late and even to suggest its connexion with that reconstitution of the Flaminium Diale by Augustus recorded in Suetonius' life of that emperor amongst other restorations of ancient ceremonies, which had gradually become obsolete 177a. What Tiberius in his subsequent speech on the same subject (23 A.D.) attributes to his predecessor is not so much restoration but a "modification of some points in that rough antiquity to suit present practice." This it is suggested may possibly have been inter alia the introduction of diffarreatio. The unpopularity of confarreatio, and the consequent difficulty of finding farreati parentes for future occupants of the Flaminates, must obviously have occurred long before Ulpian, as quoted by Boethius, could speak of that form of marriage in the past sense, and as confined to

¹⁷⁶ Festus, P. p. 74, Diffarreatio: see above, pp. 77, 78.

¹⁷⁸a Dionysius, 2. 25. Two passages often cited in support of this position (Festus, P. p. 59, *Flammeo*, and Gellius, 10. 15. 23) no doubt only refer directly to the Flamen's marriage: but this is merely an instance of the old general effect of *confarreatio*. See Karlowa, ii. p. 187.

¹⁷⁷ See Tacitus, Ann. 4. 16. On the general principle of contrarius actus see Sohm, pp. 450, 494. Girard⁵, p. 685, n. 1.

¹⁷⁷⁸ Suetonius, Augustus, c. 31. The freedom, from subjugation to manus, of a farreate wife, stated in Gaius, 1. 136, as having been effected in 11 B.C., most probably by a sentus consultum, was no doubt, an ancillary measure to Augustus' restoration of the Flaminate. It appears to have been enacted as a lex in 23 A.D. under Tiberius (Tacitus, Ann. 4. 16).

the Pontiffs, in the face of the more accurate statement by his all but contemporary the antiquarian Gaius (see n. 121). This difficulty, and the rule that the reges and flamines were bound to be themselves (perhaps only on appointment) married in a similar manner, might be got over if farreate spouses could be allowed a definite legal release from their inconvenient tie of eternal fidelity. The matter is not, I must confess, very clear. The story in Plutarch's Quaestiones of a Flamen putting away his wife in the reign of Domitian apparently represents a diffarreatio, but it is evidently spoken of as something irregular and requiring special Imperial license 178. Festus P. and Isidore are only late witnesses to the existence and complementary character of diffarreatio: both speak loosely of it as a dissolution of marriage generally intra virum et uxorem 178a, but a "third witness" quoted by Müller, an inscription probably of the 3rd century, proves the existence at that time of a regular sacerdotal officer of confarreations and diffarreations 179. On the general question of Divorce see below (p. 96).

Manumissio. Manus arising from coemptio, or I suppose its complement usus (above, p. 82), was divested, like potestas, by mancipation and manumission, which it has been agreed to postpone for the present. It should however be remembered that when women, in whose case a single mancipation and manumission sufficed (Gaius, 1, 132), are said to become sui juris, their subjection would still remain to the perpetua tutela feminarum (see Gaius, 1, 190 and above,

¹⁷⁸ Quaestt. Rom. 50.

¹⁷⁸a Festus, P. p. 74, s.v.: Isidore I can only quote from Müller. There is no diffarreatio in Isidore, Origines, 9. 8, De conjugiis.

¹⁷⁹ Inser. Orell. 2648 (wrongly in Müller, 2684), Mommsen, C. I. L. x. 6662. From the other offices held by the same sacerdos (a pluralist), this inscription is evidently later than Hadrian's reorganisation of the consilium, perhaps belonging to the time of Commodus (Msr. ii, pp. 989, n. 3 and 1031, n. 2).

p. 85). This is the reason for the artifice of the coemptio fiduciaria (above, p. 85), the object of which was not simply the avoidance of the lady's tutelage altogether, but the substitution of a tutor willing to be a mere tool, in cases of old law where a tutor's auctoritas was indispensable 179a.

In **Divorce** general, as distinguished from the special cases of abductio and diffarreatio (above, pp. 83, 94) we should first note a somewhat significant point of phraseology. Divortium, in its proper and presumably original signification, means "parting" and implies voluntary and mutual separation rather than what we mean by the English word, which is better expressed by repudium¹⁸⁰. The latter expression, which, whether unilateral (in institution) or not, is certainly not mutual, is mostly used, in Plautus, for a renunciation or rejection of proposed espousals¹⁸¹.

Cicero apparently only speaks of divortium, in a legal sense¹⁸²: the two words are used somewhat indiscriminately by the Classical Jurists¹⁸³. I do not wish to press the argument for more than it is worth: but I think the impression derived from the usage of both terms, in the literary period down to our era, is that Divorce was then considered as something mutual and voluntary (see below, p. 97, n. 186).

Romulian law. As to old tradition, we read in Plutarch of Romulus, the immemorial legislator, giving an exclusively unilateral power to the *husband* to put away his wife for certain specified offences: if he dismisses her for any other reason, half of his property is to go to her, half to the shrine

^{179a} Compare Gaius, 1. 115, with Ulpian, 11. 27. See also Cicero, pro Murena, 12. 27. Hi invenerunt genera tutorum, quae potestate mulierum continerentur.

¹⁸⁰ In the majority of passages where *divortium* occurs in Plautus the meaning is physical, or metaphorical of general "differences," rather than legal. Compare Aul. 2. 2. 56; Men. 4. 2. 71 and Truc. 2. 4. 66 with Stich. 1. 3. 50 (J. Ritschl).

¹⁸¹ Aul. 4. 10. 53, 54, 69; Pers. 3. 1. 56; Trin. 2. 4. 54.

¹⁸² See Nizolius' Lexicon. 183 See generally Dig. 24. 2.

of Demeter¹⁸⁴. A marital power of discarding the wife is attributed to the Twelve Tables by Cicero, and by Gaius, when writing on the Code¹⁸⁵. It is not expressly confined, as by Plutarch, to the husband, although this might possibly be inferred from the words of Gaius' comment¹⁸⁶. The same author, however, in his Book on the provincial Edict (possibly therefore speaking of later law) gives a pair of phrases, which clearly indicate repudium as possible to either party¹⁸⁷.

Story of Carvilius. On the other hand Dionysius, speaking, it is true, mainly if not only of the marriage by confarreation (see, however, p. 77), which of course he attributes to the same primeval legislator, and enlarging upon the domestic discipline which has been described above (pp. 74, 75), tells us that nothing was to divide this marriage, and that

184 Plutarch, Romulus, c. 22. ὁ (νόμος) γυναικὶ μὴ διδοὺς ἀπολείπεω ἀνδρα, γυναϊκα δὲ διδοὺς ἐκβάλλεω ἐπὶ φαρμακεία τέκνων ἢ κλειδῶν ὑποβολῆ καὶ μοιχευθεῖσαν ἐι δ' ἀλλως τις ἀποπέμψαιτο, τῆς οὐσίας αὐτοῦ τὸ μὲν τῆς γυναικὸς είναι τὸ δὲ τῆς Δήμητρος ἰερὸν κελείων. See also above, p. 74. Demeter no doubt represents the genuine Italian Ceres, the Creator or Producer: Curtius, p. 155: Corssen, ii. 350. For the offences so strangely coupled I would suggest as an alternative to Karlowa's explanation of φαρμακεία τέκνων (Bezauberung der Kinder, ii. p. 187), drugging to procure abortion. The forging of the (cellar) keys I think he is right in identifying with Dionysius οίνον πιοῦσα (above, l.c.). As to the apparently inevitable consequences (καὶ) of anything beyond the "glass of currant wine" (potu dulcia) allowed to the ancient Roman matron, see the interesting chapter of Gellius (10. 23) hereafter considered, n. 198.

185 Cicero, 2 Philipp. 28. 69. Suas res sibi habere jussit, ex duodecim tabulis claves ademit, exegit. See however Girard's explanation, which I venture to think not very happy, of this passage, p. 149, n. 3. Gaius ad legem duodecim Tab. Dig. 48. 5. 44. Si ex lege repudium missum non sit, et

ideirco adhue nupta esse videatur.

186 I take it that the repudium was made, at any rate by interpretation of the text, to require some formal notice. See Paulus, Dig. 24. 2. 9. The "libertus" here seems an unnecessary touch of Roman brutality, but see Juvenal, 6. 146. Bucheler's Baete foras, Bruns⁷, p. 22, n. 3, may perhaps be inferred from Varro ap. Nonium, p. 77, Betere: but there is nothing to connect it with the XII.

187 Gaius, ad Ed. prov. Dig. 24. 2. 2. 1. In repudiis autem...comprobata sunt haec verba "tuas res tibi habeto," item haec "tuas res tibi agito."

the testimony to its merits was that for 520 years no Roman marriage was dissolved-that is, until the consulship of M. Pomponius and C. Papirius in which he places the divorce of Sp. Carvilius 188. This strange story, which has to be pieced together out of very indifferent historical authorities, runs thus. Carvilius had been compelled by the officers conducting a recent census (in which the numbers appear to have fallen below the average), to avow the ancient Roman, and modern Napoleonic view as to the sole object of marriage "uxorem se liberum quaerundum gratia habiturum" (above, § 2, p. 41). Shortly afterwards, therefore, his scruples compelled him, against his will, to repudiate a wife to whom he was much attached, sterilitatis causa. done de amicorum sententia (above, p. 55) but did not, one is glad to hear, meet with universal approval¹⁸⁹. A more arbitrary case of repudium, nullo amicorum in consilium adhibito, is attributed to a much earlier date, 307 B.C. Here however the Censors express their disapproval by removal of the husband from the senate. This case I think depends on the somewhat slender authority of Valerius Maximus alone¹⁹⁰. It may be taken, for what it is worth, with the story of Sp. Carvilius, who was evidently a real personage, and the contemporary belief as to the harsh and unprecedented character of his divorce a historical fact 191.

188 Dionysius, 2. 25. καὶ τὸ διαιρήσον τοὺς γάμους τούτους (φαβραχείους) οὐδὲν ῆν....μάρτυς δὲ τοῦ καλῶς ἔχειν τὸν περὶ τῶν γυναικῶν νόμον ὁ πολὺς χρόνος. ὁμολογεῖται ἐντὸς ἐτῶν εἴκοσι καὶ πεντακοσίων μηδεὶς ἐν Ῥώμη λυθῆναι γάμος. Then follows the story of Carvilius.

¹⁸⁹ For this strange story, besides Dionysius, see Valerius Maximus, 2. 1. 4, Gellius, 4. 3. 1, 2 and 17. 21. 44 and Plutarch, Quaestt. Rom. 14 and 59. Of the different dates given to the affair I take that adopted by Zumpt, 231 B.C.

190 2. 9. 2. The name, in my edition L. Antonius, is read L. Annius by Muirhead, p. 210, n. 9. For the particular date, an Antonius or an Annius is equally unlikely to occur.

¹⁹¹ Roman literature begins, in the very year of this divorce, with Naevius' first play (Gellius, l.c.) and history becomes more credible.

Perhaps, however, a rather different view may be taken of his conduct, from that suggested above. Although called by Gellius a vir nobilis, he belongs to one of the new Plebeian families, himself or his father being Consul with a Postumius three years before the date usually assigned to the divorce 192. He had a freedman of the same name as himself who opened the first grammar school at Rome 193. Possibly Carvilius was the sort of innovator who would naturally be disliked by patrician historiographers, and might have been made a scapegoat for some national calamity, but for the loss of Livy's 20th Book and the superior claims of the unlucky Caius Flaminius.

Reconciliation of these accounts. How are we to reconcile what seems at first sight a tissue of contradictions? Not, as it seems to me, with the general disbelief of Pais. I venture to suggest, as is more fully indicated elsewhere, two forms of marriage from the beginning.

One, cum manu, originally perhaps only contracted by confarreatio, and confined to the patriciate, but thrown open to the lower order by the Servian regulation, and the legislative or quasi-legislative sanction of coemptio. The dissolution of this marriage, whether competent to both parties or not, was fenced about with public ceremony, and either by general opinion, or the Censor's nota, which came to represent that opinion, rendered, among the upper classes, with whom marriage cum manu was the general form, difficult and unusual.

The other marriage, sine manu, originally rustic and plebeian, depended upon the mere joint agreement of the parties, on equal terms, and was (though by no means exclusive of rough usage), as a legal tie, lax and easy, being

¹⁹² There seems therefore, in his case, no question of confarreatio or diffarreatio.

¹⁹³ Plutarch, Quaestt. Rom. 59.

terminable at will by either party in such vulgar terms as we might render "Take up your traps and begone," or, "You look after your own affairs 194." It is the gradual adoption, for the sake of its freedom, of this marriage, by the upper classes, which seems to me indicated in the stories of Antonius and Carvilius.

Dos is, in my point of view, distinctly the result of marriage sine manu, so soon as it began to be adopted by persons of quality and property. Before that time there was no necessity for it, or for actions and securities rei uxoriae, there being among such persons few or no divorces 195. There is however high modern authority against this view 196.

Dos and dotis dictio. But both dos and divortium occur frequently in Plautus and Terence (194—159 B.C.), restitution of the former being evidently regarded as quite an ordinary thing 197, consequent on the latter, which, as pointed out above (p. 96), is generally a matter of mutual consent. I need not perhaps remark that the manners and morals described in the two Roman comic writers best known to us are simply those of a well-to-do Roman bourgeoisie.

In an extremely difficult passage from a speech de dote of Marcus Cato (apparently the Censor) preserved by Gellius, while the strange legislation, which Dionysius imputes to Romulus (above, p. 75), reappears under the form of a popular morality, there is also, to my mind, clear ground for the inference that power to take the initiative was already (c. 180 B.C.) equally competent to either

¹⁹⁴ See above, p. 97, n. 187.

¹⁹⁵ Gellius, 4. 3. 1. Memoriae traditum est quingentis fere annis post Romam conditam nullas rei uxoriae neque actiones neque cautiones in urbe Roma aut in Latio fuisse, quoniam profecto nihil desiderabantur, nullis etiam tunc matrimoniis divertentibus. Then follows the story of Carvilius.

¹⁹⁶ Particularly Girard⁵, pp. 167, 952, n. 2, and the earlier part of Karlowa, ii. § 17.

¹⁹⁷ Stichus, 1. 3. 50.

party¹⁹⁸. When it is the husband, says Cato, who makes the divorce (i.e. when the lady is *primâ facie* in the wrong) the *judex* (in the action *rei uxoriae*) is, to the wife, in the position of a Censor: nay, he has an unlimited coercive power¹⁹⁹. If she has merely been guilty of vexatious or offensive conduct, she is fined: if she has drunk wine or committed some act of immodesty with another's husband, she is cast²⁰⁰.

The different views as to the interpretation of this passage are more fully set out in the note. Whichever be adopted, the inference drawn above, from the very emphatic position of the word *vir*, is, I think, justified.

It is unnecessary to labour the point that dos, and the independence of the married woman, which was its cause or its consequence, were already in full blast two centuries before our era: its existence in earlier times is the matter in question.

It is always difficult to prove a negative: we can only examine carefully the positive or quasi-positive evidence.

Of the existence of a dotis dictio, or a dos at all, in our

¹⁹⁸ Gellius, 10. 23. 4. Vir, inquit, cum divortium fecit, mulieri judex pro censore est, imperium, quod videtur, habet; si quid perverse taetreque factum est a muliere, multitatur; si vinum bibit, si cum alieno viro probri quid fecit, condemnatur.

¹⁰⁰ See, as to the powers of the actual Censor, Msr. i. pp. 142, 143; ii.

²⁰⁰ I take, it will be seen, the view of Roby (R. P. L. i. p. 157. 1) that the vir here is not the judex spoken of. Karlowa (ii. p. 188) and, I think, Greenidge (Legal Procedure, pp. 370, n. 3, 371, n. 3), hold that he is: the former, in fact, using the phrase judex domesticus. Whether the judex actually intended is supposed to function in a judicium rei uxoriae or in a distinct one de moribus mulieris is a matter of question. As to the latter action see Gaius, 4. 102, Paulus, Dig. 23. 4. 5. pr. and C. Just. 5. 17. rubr. and 11. 2 b. Condemnatur, in my interpretation, would mean "loses her dos altogether," which seems to conflict with Ulpian, 6. 12. See however the stories of a woman being amerced tota dote in Pliny H. N. 14. 90 and Val. Max. 8. 2. 3.

fragments of the Twelve Tables, I cannot see in spite of the researches of Voigt²⁰¹ any satisfactory proof.

A great deal of the elaborate argument of Karlowa, on this question, seems to me to depend solely upon the developement of the subject of dos in later Jurisprudence²⁰², not to speak of such generalities as Cicero's statement that the whole property of a wife coming in manum becomes the husband's dotis nomine, and Paulus' argument that a wife's whole property may be given as dos, on the analogy of an in manum conventio203. The whole of the reasoning about dotis dictio belongs in fact to the subject of oral contract, the date of which is much disputed. It cannot, in the view here adopted, come before 326 B.C. the earliest year assignable to the lex Poetelia²⁰⁴. In the passage from Cato's speech treated above (n. 198) Karlowa identifies the vir with the judex there mentioned and apparently explains the fining of the wife to be some retention out of a peculium allowed her as filia²⁰⁵. Apart from the construction, this view requires a very questionable assumption.

Conclusion. Late Imperial Constitutions speak of the freedom of matrimony in respect both of contraction and dissolution as an old established rule of law²⁰⁶. But we

²⁰¹ In his book on the Twelve Tables, he enumerates an actio dictae dotis among those which he alleges to come under the general head of legis actio sacramenti (i. § 60, p. 589), and he has a section (§ 123) on this subject in his second volume. Here, in a statement that the Code knows nothing of the delegatio (of a debtor) dotis constituendae causa, he clearly implies that it does recognise other dos: but I cannot find either direct statement to that effect, or evidence. See, however, Muirhead², p. 234, n. 1: Girard², p. 956, n. 4, and Karlowa, ii. p. 202 and notes.

²⁰² See particularly Karlowa, ii. pp. 191, 211, 214, 215.

²⁰³ Cicero, Topica, 4. 23: Paulus, Fr. Vat. 115.

²⁰⁴ See Gaius, 3. 95, 96, eked out by reference to the later Epitome, 2. 9.3. The substitution of *stipulatio* for, not its developement out of, *nexus* must be treated elsewhere.

²⁰⁵ Karlowa, ii. pp. 190-192.

206 Alexander Severus, Cod. 8. 38. 2: Diocletian and Maximian, Cod. 5. 4. 14.

cannot rely much upon these expressions, which belong rather to the phraseology of Juristic interpretation, as any evidence for a prejuristic antiquity of free marriage. I can only repeat my belief of the possibility of such marriage having existed from the beginning, and having been practically recognised as legal by the Twelve Tables, but confined to the lower orders, and only introduced into upper class society about the time indicated by the story of Carvilius Ruga, or a little earlier. On the ultimate predominance of the laxer tie I would refer to any history of the later Republic²⁰⁷. For the possible identification of the two forms of marriage with different ethnic elements see below, § 6, pp. 245, 246; § 7, p. 275.

²⁰⁷ Muirhead, § 47: Moyle, Instt. Just. 5 pp. 130, 131, &c.

§ 4. SUCCESSION AND LARGER FAMILIA

RESULTS on decease of paterfamilias, p. 104. Succession to hereditas, 105. Is testate or intestate the earlier? ib. Sui heredes, ib. Equal sharing of sui, consortium, "ercto non cito," 107. Agnati as defined by Jurists, 109. As matter of predecemviral custom, law of Numa, 111. Maine and M'Lennan on agnatio, 112. Modern opinion, alleged direct parallels, 114. Bloodfeud and Wergild, Miss Phillpotts, 115. Legislation of XII and its object, in this respect, 116. Familia in larger sense, cognomina, 119. Cognatio, 122. Sacra familiaria, 124. Tutela, 125. Patroni, 127. Affinitas, 128. Appendix, 129.

Results on decease of paterfamilias. On the death of a paterfamilias, the free persons in his immediate potestas or manus¹ become sui juris or independent. The persons in question include wife in manu and all children in the first degree who have not passed out of the deceased's potestas. A married daughter, who has not passed in manum of her husband, belongs, as we have seen² to the latter category. But her children, if born of justae nuptiae, will (semble) remain under the power of their own father³. Grand-children, through sons in potestate, fall under the power of their father, or, if he be dead, become independent. These results all follow naturally from the conception of potestas

¹ For the different case of persons in mancipio see § 3, p. 88

and manus. The qualified control of tutela is a separate matter4.

Succession to the persona of the deceased is a somewhat difficult subject, best treated under the law of actions; succession to his property (hereditas) being rather what claims our present attention.

Hereditas, as we have seen elsewhere (Jurisprudence, ii. pp. 552, 702) bears sometimes the meaning of an aggregate sometimes of a right. Substituting here the less ambiguous term Succession, we have next to consider, as to proper order of treatment, the question: is Testate or Intestate Succession the earlier? In answer to this question I venture to disregard the order observed by Gaius, and, as I understand him, the opinion of Karlowa, who holds that the principle of Testation was considered natural and ordinary, from the oldest times, by the Roman mind, and Intestacy the exception⁵.

Whether I am justified or not, in taking the power of Testation at Rome, though very ancient, as possibly not original, I shall treat of Intestate Succession first, on account of its special connexion with the subject of agnati and of familia, in the larger sense in which the latter word is occasionally used, viz. of a group of persons related to one another, but not all under one actual potestas⁶. It is scarcely necessary to say that the fragments of the Twelve Tables are here repeatedly taken as evidence of already existing Customary Law.

Sui heredes. Assuming, then, intestacy, we find that

6 Ulpian, Dig. 50. 16. 195. 2, 4: Girard, p. 144, n. 2.

⁴ Below, p. 125.

⁵ As to Gaius, see below, n. 86: as to Karlowa, see generally ii. §§ 79—89, particularly ii. pp. 848, 849. Girard, who holds the same view (Manuel ⁵, pp. 793, 842, 843) nevertheless gives, in a note, an interesting list of nations, Indo-European and otherwise, to whose ancient law the Testament is unknown, l.c. p. 793, n. 4. Compare Maine, V. C. pp. 41, 42.

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the free persons who were, during the life of the paterfamilias, in his power, became on his death sui juris, under their own control, and at the same time sui heredes. This is often explained as "takers by their own right" of the deceased's rights and obligations—his means generally—and it is so far true that they require no statutory or judicial summons, but take their position ipso facto of the intestate's death. But this explanation does not give the true meaning of the word suus, which expresses their relation to the deceased. They were his, the persons in his power, and, during his lifetime, only presumptively his heredes. It is, in fact, the old popular explanation of suus given above, which has led to the entirely erroneous idea of the sui having a sort of joint ownership with the paterfamilias, in his belongings, during his life?. This view has no doubt gained some support from vague expressions of the Jurists regarding the sui as in a manner owners during the life of the father and continuing the ownership after his death8: but they seem to me quite insufficient to support any theory of coproprietorship, even when backed by undoubted foreign analogies9.

The question of communal property, belonging to the tribe or clan, as distinguished from the private property of the individual is a different one, which has its special difficulties to be considered hereafter, arising out of the old

⁷ Above, § 3, p. 62. This subject is very well treated by Karlowa, ii. pp. 879, 880.

⁸ Gaius, 2. 157: Paulus, Dig. 28. 2. 11. As to the argument of Austin (51. 863) based upon the word αὐτοκληρονόμοι in Theophilus, it must be remarked that the word only occurs in a marginal note: Theophilus himself speaks (Just. 2. 19. 2) of σοῦοι.

⁹ See Sohm, p. 530: Girard⁵, pp. 260, 844, nn. 4, 5, and above, § 2, p. 22. In a similar case of family ownership sometimes alleged among our own Anglo-Saxon ancestors, Maitland shews that there is no clear proof of any necessity for consent, on the part of a man's maegth, to alienation either intervivos or by will, P. and M. ii, pp. 246—250.

word heredium, and the legends connected with it (see § 5A,

pp. 213 sqq.).

Very little support to the doctrine of family coproprietorship among the Romans can be drawn from the connexion of heres with herus, which is generally though not universally admitted¹⁰, or from the frequent passages in the comedians where the son is called erus minor ("Young Master") and the father erus major¹¹, and the one or two in which heres is almost equivalent to dominus¹² though always I think with some play upon the specific meaning of succession, which it had certainly acquired before the Twelve Tables¹³. It is possibly in comment upon such passages that Festus tells us that heres was put in old writers for dominus, which is repeated in almost as many words by Justinian in explanation of the phrase pro herede¹⁴.

Equal sharing of sui. Whether there ever was one principal taker of the intestate deceased's property, or not, at Rome, we have, in our Roman authorities, no trace of primogeniture or of the exclusion of females. It is, to me, somewhat remarkable that we do not find, in them, any direct statement of the children in potestate taking equally. That principle has rather to be inferred from what is said about the family of a deceased child succeeding to the share of their parent 15, from the rules of agnate succession, and from what Dionysius says about the wife in manu sharing equally with her children 16. I find the same chariness of direct statement in

¹⁰ Corssen², i. p. 470; Beit. zur Lat. Formenl. pp. 40, 111, both from a root har, nehmen: Curtius contra, p. 199. Erus or herus is certainly not to be identified (as by Jhering⁴, ii. p. 162) with Herr, Kluge, s.v.

u e.g., Plautus, As. 2. 2. 63; Capt. 3. 5. 50; Merc. 1. 2. 2; Truc. 2. 2. 53.

¹² e.g., Men. 3. 2. 11; Most. 1. 3. 77.

¹⁸ Below, p. 110. 14 Festus, P. p. 99, Heres: Just. 2. 19. 7.

¹⁵ Gaius, 3. 7, 8: Ulpian, 26. 2.

¹⁶ Ulpian, 26. 4: Paulus, Coll 16. 3. 19: Dionysius, 2. 25.

modern writers, who treat the "power of sharing," enjoyed by the *sui*, as a logical consequence of their self-heirship or continuation of the intestate's personality, &c., to be assumed as a matter of course, rather than to be stated as an independent fact, requiring surely some remark¹⁷.

The keeping together of properties, especially in land, was doubtless often effected, or allowed to remain, by family arrangement. In this case a sort of partnership was formed which has been considered by many to have been the origin of the rather unintelligible Societas omnium bonorum of later It is not however the Roman Societas omnium bonorum but the inseparable union of the Pythagorean scholars, who had all things in common, that our authority, Gellius, is actually comparing with the ancient Consortium, which, in the Roman law and language was called "ercto non cito19." Of the three mysterious words at the end of this passage I must postpone my attempt at explanation until I come to the passage of the Twelve Tables to which they probably belong. For the present I accept Servius' statement that they mean that the patrimony or inheritance has not yet been divided20 and that of Festus that sors in consortes means patrimonium²¹. That sors means literally the land assigned by lot, as Professor Goudy correctly says in an addition to Muirhead's note22, bears rather on a question

¹⁷ Compare inter alia Girard⁵, p. 844: Sohm, p. 524, &c. with the more satisfactory comparison of this fact by Muirhead² (p. 45), with other and different systems.

¹⁸ Muirhead², p. 45: Roby, R. P. L. ii. p. 128. 1: Girard⁵, p. 575. 3. Karlowa, however, ii. pp. 652—656 argues strongly against this view.

¹⁹ Gellius, 1. 9. 12. Quod iure atque verbo Romano appellabatur "ereto non cito."

²⁰ Servius ad Aen. 8. 642 (Bruns⁷, ii. p. 79). See however Corssen, Beit. p. 41.

²¹ Festus, F. p. 297, Sors, cf. P. p. 296. Sors et p\u00e4rimonium significat. Unde consortes dicimus.

³² Muirhead², p. 45, n. 8.

considered in another section (5A, p. 220). Enough is said here to illustrate the continuing consortium of sui in an undivided inheritance. One would not think this arrangement likely to be a very enduring institution: but Dr Roby (l.c.) cites two comparatively late instances one from the time of Trajan, one from that of Septimius Severus²³.

Agnati. The succession of the sui to a deceased intestate is assumed, like so much other old law, by the Twelve Tables: if there shall be no suus the next agnatus is to have the familia²⁴. We are nowadays so familiar with agnatic relationship as a technical term, that we never pause to think what would seem to be the natural meaning of the word agnati—additional or afterborn children: nor indeed should I mention this meaning, did it not actually occur in Tacitus' Germany, where it may seem to indicate some vague idea of primogeniture²⁵. As has been said above (p. 107) no such idea is to be found at Rome. There is no reason to suppose that agnati ever meant, in Roman law, anything but what the word is defined to mean by the Jurists, i.e. blood relations, whose relationship to the deceased is traced

²³ Pliny, Ep. 8. 18. 4: Papinian, apud Ulpianum, Dig. 17. 2. 52. 8. In the latter I doubt whether consortium is used in a technical sense.

²⁴ This is the part, at present concerning us, in the remarkable passage of the Twelve Tables quoted, from Ulpian's chapter on Statutory Inheritance, by the author of the Collatio, in his chapter on Numbers 27. 1—11. Coll. 16. 4. 1, 2. "Si intestatus moritur cui suus heres nec escit agnatus proximus familiam habeto." Si agnatus defuncti non sit, eadem lex duodecim tabularum gentiles ad hereditatem vocat his verbis "si agnatus nec escit gentiles familiam [habento." nunc nec ullus est] heres hinc nec gentilicia jura in usu sunt. The words in brackets are due to Krüger. There can be little doubt about the habento: the rest is more problematical: see an argument, \$5. p. 149.

Cicero, de Inventione, 2. 50. 148, purports to quote the same words: but his quotation is full of obviously late reproductions.

²⁵ Germania, c. 19. It is however also found in his account of the Jews, Hist. 5. 5, with apparently the same sense.

entirely through males²⁶. The statement that these relations must be themselves of the male sex27 appears to be a slightly incorrect generalisation from the narrowing of female agnatic descent to the first degree, i.e. of sisters, which is said by Paulus to have been effected jure civili, on the principle of the lex Voconia; by Justinian to be due to what he calls the media jurisprudentia28: the law of the Twelve Tables, according to both, making no distinction of sex. The law of the Twelve Tables certainly as we know it (n. 24) only specifies the masculine, which would literally have excluded even a sister by the same father. In any case, it must be, what Karlowa calls it, a matter of interpretation29, the result arrived at being a compromise between ordinary humanity and the thick and thin supporters, like Cato³⁰, of the principle of the lex Voconia, i.e. the discouragement of a woman being appointed as heres to a fortune beyond a certain amount³¹. I must return, however, from the questions arising out of the later interpretation of the Code, to the inferences which are to be drawn, as to the old customary law, from the Code itself.

The object of the clause above quoted (n. 24) is evidently to regulate succession by agnatio. That such was the case is indicated by the fact that this succession came particularly to be known as the statutory one³².

²⁶ Gaius, 1. 156; 3. 10 (cf. Just. 3. 2. 1).

Paulus, Coll. 16. 3. 13: Ulpian, 11. 4; 26. 1 and Coll. 16. 6. 1; 16.
 See however below, p. 118.

²⁸ Paulus, 4. 8. 20, 21: Just. 3. 2. 3.

²⁹ The two passages cited above give us the valuable equation of jus civile = the work of the Jurists between the Twelve Tables and the imperialis dispositio, the license of Augustus or the rescript of Hadrian.

Ociero, de Senectute, 5. 14, describes his support of the lex "magna voce et bonis lateribus."

³¹ Carried 169 B.C. (Cicero, l.c.). See, on the subject generally of this paragraph, Karlowa, ii. pp. 883, 884.

³² As appears from Ulp. 26. 5. in legitimis hereditatibus successio non est, as distinguished from the case of a deceased *suus*, leaving children, ib. § 2. See Marcellus, Dig. 38. 16. 9.

Matter of predecemviral custom. The same Code, we are told by Ulpian, directly³³ introduced the tutela of agnates. But there appears no sufficient reason to believe that it introduced the name or idea of the relationship itself, known as agnatio, which has been maintained by modern writers³⁴. I shall therefore assume that the agnati were a class of relations recognised by predecemviral customary law.

It follows, from the definition of Gaius given above (p. 110), and from the principles of potestas and manus, that the agnati were those of a man's kinsmen who were subject to the same patria potestas as himself, or would have been, had the common ancestor been still alive 5. In contrast with what has been suggested (p. 109) as what might seem a natural meaning of the word, they are not children "sideborn" or additional to a first son, but descendants side-born or additional to a first class of sui. I do not however place much weight upon this supposed original meaning of the word: but shall proceed to consider two different theories as to the legal origin of the relationship 36.

³³ Ulpian, 11. 3 palam, as opposed to per consequentiam in the case of patroni.

³⁴ Muirhead², pp. 43, 118: Poste⁴, p. 274 (on Gaius, 3. 9): perhaps Cuq, i. p. 285: contra, Karlowa, ii. pp. 881, 882 and, I think, Girard⁵, p. 12, and Cuq, i. 310. The ingenious emendation of Huschke (agnatis from ac natis for the ms. et natis) in the "law of Numa" preserved by Servius (see Muirhead, l.c. n. 2, and below, § 20, n. 10) is not, to me, so conclusive as it once was (E. R. L. p. 48). Blood revenge is, as Leist points out (p. 349), not confined to the agnati. Cato, in his Origines (Priscian, 6. 13. 69), gives us the interesting statement, most probably derived from the XII, Si quis membrum rupit aut os fregit, talione proximus cognatus ulciscitur. (See Miss Phillpotts Kindred and Clan, pp. 267 et seq.) In "Numa's" law, Leist shews that occisi does not depend on pro capite. It is in the former word, that emendation is perhaps to be attempted. Is uxori et natis quite out of the question?

³⁵ Muirhead², p. 118, n. 9. See Maine, A. L. p. 149.

³⁶ With much respect, I must entirely leave out of the question Muirhead's view that the notion of agnation, as a bond distinct from that which connected the gentile members of a clan, was *due* to the Decemvirs, pp. 117, 118, 163, n. 12, &c., &c. See, however, Msr. iii. p. 16.

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Maine and M'Lennan on agnatio. Sir Henry Maine regards patria potestas as the foundation of agnatio, and, where he finds the latter existing alone, infers that the former must have preceded. These views have been criticised at great length by M'Lennan in chaps. XII—XIV of his Patriarchal Theory. The reasoning of the latter is, I must say, to my mind often too subtle to be either satisfactory or intelligible³⁷. His own view is that agnation is arrived at through a system of paternity following on one which counted kinship through females only: that it is distinctly exceptional, instead of being, as Maine took it to be, widely prevalent, if not universal; and that, in particular at Rome, an originally "exogamous" condition of the gens accounts for the existence of agnatio better than the patria potestas does³⁸.

It appears to me that, while there is something to be said for M'Lennan's second point (the exceptional character of early agnatio, taken strictly), his first is a pure hypothesis, depending on an extremely improbable assumption, viz. that a close system of rigorous exclusion growing out of one principle of relationship, reckoned through the mother only, could be transferred, in all its rigour and exclusiveness, to a new system founded on the entirely different principle of reckoning relationship through the father only39. His reasoning about the Roman gens I postpone, for the most part, until I come to consider that institution independently. Here I wish merely to observe that the passing of the wife into her husband's family and out of her own (with the results of agnatio) can be accounted for at once, without the necessity for any reliance upon an exogamy, for which there is no direct evidence (see § 5, pp. 150 sqq., 171), by the law or

See particularly, pp. 190, 191.
 See pp. 203, 247, 252, 254.

This view does however appear to be held by Miss Phillpotts, i. p. 269.

custom of manus, a subject very cursorily and inadequately considered by M'Lennan.

As to the comparative duration at Rome, of patria potestas and agnatio, on which M'Lennan lays considerable stress (p. 195), I do not see how much can be proved, one way or the other, from the ultimate fate of institutions, the scope of which was, or came to be, confined to such very different provinces.

Potestas was a matter of control, over person and property, operating merely within the life of a parent or grandparent, and so retained, at least in theory, down to the time of Justinian. Practically it had, no doubt, been modified in many important respects by statute (as early as the XII), by custom and general feeling (enforced through the Censor's nota), and by statute again in the Imperial period.

Agnatio was, in historical times, confined to questions of guardianship and succession in case of intestacy. As to the former, although probably intended, in its origin, simply to operate in the interest of reversioners ascertained as above⁴⁰, it clearly came to be regarded, in the end, as a burdensome duty⁴¹. So the perpetua tutela of women, thrown on the agnati⁴², was got rid of, in the interest of both parties, before the time of Cicero⁴³ by a collusive employment of the XII, and, later, abolished by Statute⁴⁴.

In the matter of succession to property, the law of agnatio, as recognised by the XII, was superseded, if not directly abolished, by the Praetor's "call" to inheritance in the clause unde legitimi. This bonorum possessio must practically, it would seem, have ousted the gentiles⁴⁵.

⁴⁰ p. 109. See Gaius, 1. 165 ad finem: Just. 1. Tit. 25.

⁴¹ Gaius, 1. 168. 42 id. 155, 190 and above, § 3, p. 85.

⁴⁸ Cicero, pro Murena, 12. 27.

⁴⁴ The lex Claudia. See Gaius, 1. 157, 171.

⁴⁵ Poste's Gaius⁴, p. 282. See however Ulpian, Dig. 38. 7. 2. 4 and Cicero, Verr. 2. 1. 45. 115.

Modern opinion is rather disposed to side with Maine than M'Lennan as to the probable origin and the actual prevalence of agnatio. According to Girard the larger familia (below, p. 119) is a sort of retrospective development of the household: the relationship of agnatio, with its exclusions as well as its inclusions, is based distinctly on the potestas.

As to parallels in other early nations, he is, I think, inclined to consider agnatio an original principle in the Indo-European race, but leaves the question unsettled as matter of dispute⁴⁶. Others speak more positively on this subject. "Nothing can be clearer," says Vinogradoff, "than the Welsh evidence as to the gradual developement of higher agnatic units from the family household, and as to the passage from the primary family to the joint family, and from thence to the kindred⁴⁷." In support of this statement he cites Seebohm's Tribal System in Wales. On consulting that work, however, I must confess that I have been unable to see this clear evidence, in the system referred to, of anything like the very exclusive principle of Roman agnatio, being obliged directly to recognise, in that system, maternal units as a bond of kindred48. In Lewis' Ancient Laws of Wales also, while the specific foundation of agnatio-manusis clearly, though not nominally, recognised in the "forisfamiliation of the woman on marriage," and a reasonable object suggested for it, the author goes on to state very considerable qualifications of the principle, mainly in connexion with the galanas or payment for homicide49.

In Teutonic nations Vinogradoff recognises the principle of agnation, but only in a broad, not strictly Roman. sense.

⁴⁶ Girard⁵, pp. 145, n. 2 and 148, n. 1.

⁴⁷ Growth of the Manor, p. 13: see also p. 143.

⁴⁸ Seebohm, p. 102. It is not, of course, conclusive, but I have, as a matter of fact, been unable to find any occurrence of the word *agnatio* in the book.

⁴⁹ Lewis, pp. 50, 51. See also pp. 11, 12, 195.

It appears mostly on the subject of wergild, in which there is a distinct preference for relations of paternal over those of a maternal character49a.

As will be seen hereafter (p. 123) I do not regard that payment as any special object of the Roman agnatio: but, as it has been connected with that subject by good authorities I may be pardoned a digression, which comes, I think, better here than under gens.

Bloodfeud and wergild are among the most striking phaenomena in early nationalities. I wish specially to refer to the interesting work of Miss Phillpotts, who has collected a great deal of reference to original authorities in her recently published Kindred and Clan, but the digression is too long to be inserted in the text⁵⁰. The direct subject of this work is the solidarity of the kindred in Teutonic races, in the middle ages and after; the main question being how to account for its gradual decay. A full sketch, however, is given of the earlier law or custom, particularly in the Scandinavian countries of Norway and Iceland 50a. This solidarity consists, as far as I can gather, rather in a general cohesiveness of blood-relations, by no means exclusively agnatic, than in their acting as a body: they are treated as something between a Cabinet and a Corporation, nearer in fact to the former.

The point of view, under which the subject is examined, is almost exclusively confined to the receiving and paying of wergild for a person slain; what may be termed the posthumous value of the deceased. This wergild is apparently

⁴⁹a Manor, pp. 135, 136, 139. By the way I may remark that Vinogradoff notes, in distribution of conquered territory, an allotment to maegths, p. 140, sometimes bearing a local name but always connected with a kindred. For the slightly different view here adopted as to the Roman gens see below. § 5, p. 170.

⁵⁰ See the Appendix to this section.
508 Phillpotts, pp. 13, 49, 50. On the probably more genuine antiquity of the Norwegian records see ib. p. 46, n. l.

a secondary development of a right of revenge, among a comparatively cold-blooded northern people. Among the ancient Romans we find the value of a lesser hurt, as between individual and individual, assessed on a money scale: but more serious injury may still require satisfaction by a *like* revenge *talio* (below, p. 123 and § 20, p. 614); and life taken must be compensated by the taking of another life.

The interesting account of the aries which subigitur or subicitur, instead of the life of an accidental homicide, under an alleged law of Numa, will be more explicitly considered among the regiae leges⁵¹. It has been briefly referred to already, and its effect, as proving the predecemviral existence of agnati, questioned (above, n. 34).

An extension of this presumed right or duty of agnati, failing any such, to the gentiles, is suggested by Karlowa⁵² but on no definite authority. Jhering⁵³ admits the absence of testimony (Roman) for this extension, but cites, as parallel, the sharing, in receipt or payment, of wergild, by the Anglo-Saxon gegyldan, whom he regards, on the authority of Sybel, as filling the place of "the old gentiles." Such an identification, to which Sybel's words scarcely amount, is anyhow too much matter of hypothesis to be allowed as evidence on the Roman custom, but the suggested parallel is interesting enough to deserve insertion in the Appendix to this section.

I must, now however, return to the text of the Twelve Tables, as quoted by Ulpian (above, n. 24); the treatment of which I am obliged to anticipate here, partly because, while appearing in the Code, it is an obvious regulation of previous custom; partly because of the light which it throws on the

⁵¹ Below, § 20, where the various authorities are quoted in full.

⁵² Karlowa, i. p. 36. There is apparently authority for this in Attic law, both as to those ἐν γένει τοῦ πεπονθότος and his φράτερες. See § 9, App. p. 348.

⁵³ Jhering ⁵, i. p. 188, n. 85. See on this subject below, App. p. 130 and §5, App. in generally.

gens and gentile ownership, the subject of the next two sections.

After the clause translated above (p. 109), come the words "if there be no agnatus, the gentiles are to have the familia⁵⁴." The difference of expression, between the singular of the proximus agnatus, and the following plural of the gentiles, is repeatedly noted by Karlowa, in the section which he devotes to intestate succession under the statute (§ 82), but I do not consider its significance by any means adequately explained in his comment⁵⁵.

It may be that succession by the gentiles generally was the right originally recognised, on intestate decease 55a, except as to the very small holding definitely styled heredium (see § 5A, p. 213). It is also clear, I think, that the gentiles would be here regarded as individuals, not as a corporate body. Any definite legal idea, indeed, of a corporate body, is probably of much later developement than the time of the Twelve Tables 56. It might appear to have been in Cicero's mind when he speaks of the statutory right of the gens Minucia to the inheritance of an obscure person bearing that name (Minucius quidam) who apparently died intestate and without any traceable relative 57. Whether the claim was ever actually set up, we do not know. It was,

⁵⁴ The time, when the proximus agnatus had to be determined, was, no doubt, when the intestacy was certainly ascertained. See Gaius, 3. 11: Just. 3. 2. 1 and Ulpian, Dig. 38. 8. 1. 1. This does not seem however to depend on any literal rendering of the inchoative escit (Schöll, XII Tab. Rell. pp. 99, 100), the same word being used of the suus who is not "called" to the inheritance but takes at once, as of right.

⁵⁵ See particularly, pp. 881-883.

 $^{^{55}a}$ This is vaguely asserted by Plutarch of Attic law before Solon, who first introduces the $\delta \iota a \theta \eta \kappa \eta$. Solon, 21. 90.

⁵⁶ Compare the remarks of Maitland on the similar case of maegth in Anglo-Saxon law. P. and M. ii. pp. 241, 242. As regards the extract from the Twelve Tables the words are certainly in favour of Karlowa's view, which is that stated above. See however below, § 5, p. 166.

⁵⁷ Cicero, Verr. 2. 1. 45. 115.

according to Cicero, anticipated by one of Verres' irregular edicts

In this particular statement, then, we may have merely an expert advocate's voucher, against an unlearned defendant, of very old, and possibly obsolete, law. The claim, on the other hand, of the Claudii Marcelli, brought before the Centumviral Court, is more obviously a real case, and the law seems to have been treated, by the Court, as still in force. But the pleadings evidently turned upon very wide and disputable principles of ancient law58.

We do not, therefore, know how such a right could have been practically exercised. The right to gentiliciae hereditates, of which Caesar according to Suetonius was deprived by Sulla, throws no light on the subject; and the expectant gentilis of Catullus, in his letter to Manlius, is most probably only a distant next of kin⁵⁹. In any case, of the working of gentile right as originally contemplated by the Twelve Tables we know absolutely nothing. The whole jus gentilicium had gone into desuetude by Gaius' time 60.

I venture to suggest the following as the object and immediate effect of the clause in the Twelve Tables. The general devolution to the gentiles on intestacy must have been inconvenient and contested. At the same time, we may surely conceive a growing recognition of what would certainly seem to moderns a reasonable extension of right of next of kin, within the gentile circle, beyond the direct descendants of the deceased, so as to take in collateral connexions, but still under the general rule of descent through males. The main intention apparently is to postpone the gentiles, as such: whether specially to substitute a single head of the family, failing the immediate children or persons

⁵⁸ Cicero, de oratore, 1. 39. 176. See also below, § 5, p. 149.

⁵⁹ Suetonius, Caesar, 1: Catullus, 68. 123. See Karlowa, ii. p. 884: Girard⁵, p. 845, n. 4.

⁶⁰ Gaius, 3. 17: cf. Coll. 16. 4. 2.

in power, I cannot say: the words look rather like it. They were certainly interpreted, by the Jurists, in a plural sense, so far as to include all agnates of the same (nearest) grade⁶¹. But the single agnate, as successor, seems rather contemplated, as the ordinary occurrence, by Gaius, in his notice of the cessio legitimae hereditatis⁶². On the question whether a female was originally intended to succeed or not, see above, p. 110.

Familia in the larger sense. Cognomina. The persons connected by agnatio are sometimes spoken of as a familia in a larger use of the word⁶³. Conversely, agnatic relationship is presumably true of Roman citizens bearing the same cognomen; literally coupled name, coupled, that is, with the gentile nomen: cognomina being, it must be observed, only borne by males.

What I shall have to say on this subject is mostly drawn from Mommsen's exhaustive Essay on Roman proper names, so far as that essay is concerned with the earlier or genuine Republican usage⁶⁴.

The cognomen was always a mark of some nobility or distinction, being originally confined to the patrician gentes. It belonged, in most of the older instances, obviously to the class of nicknames⁶⁵, arising from some peculiarity of appearance or habit in the individual, to whom it was first applied,

⁶¹ Just. 3. 2. 5: Paulus, Coll. 16. 3. 17: Ulpian, Dig. 38. 16. 2. 4.

⁶² Gaius, 3. 85. The language of Karlowa (ii. pp. 884, 885) points somewhat in the same direction. Cf. too Gaius on testate succession, 2. 116, 117.

Ulpian, Dig. 50. 16. 195. 2 ad finem, &c.
 Römische Forschungen, i. pp. 40—68. See too Msr. iii. pp. 208, 211.

⁶⁵ e.g. Paullus, Lepidus, Pulcher, Varus, Scaurus, Scaevola (perhaps Volero), Rutilus, Mus, Dorsuo, Labeo, Nasica, Cincinnatus, Brutus, Scipio, Frugi, Bibulus. On Caesar see § 5, App. I. p. 181. Among provincial gentry we have the Tullii Cicerones, in whose case the wart on the nose, an agnomen of the first Cicero, becomes the cognomen of his descendants. See however Priscian, 2. 5. 24 who seems to make this the peculiarity of the orator himself. Contra. Mommsen, Forsch. i. p. 56.

and by which his descendants did not object to being distinguished, as such descendants⁶⁶, when they elected to detach themselves, as a separate family, from the *gens* to which they still continued generally to belong.

This separation is not considered by Mommsen likely to have been effected, in the oldest period, without some formal recognition of the "branching off of the *stirps*" or House—such, for instance, as the assignment of a separate burial-ground—evincing the assent of their *co-gentiles*⁶⁷. Any such corporate action, however, of the *gens* is a somewhat doubtful matter, which will be considered hereafter (§ 5, pp. 154 et seq.).

The formation of the class of familiae, such as are mentioned above, is probably very old, though Mommsen seems to consider a public recognition of the cognomen at all later than that of the Servian local divisions. In the very apocryphal Fasti of the early Republic we meet with cases of hereditary cognomina frequently indicative of local origin, and particularly of legends connected with the Porta Trigemina⁶⁸: in somewhat nearer approximation to history, they record stories of individual exploit, or special favouring auspices⁶⁹. To this class possibly belongs, in really historical times, the appellation of Caesar, which has gained such a world-wide notoriety: but the story of the Julian gens is

⁶⁶ The case of an individual himself setting out deliberately to "found a family," though not impossible in early times, is rather perhaps the characteristic of later.

⁶⁷ Mommsen, Forsch. i. p. 49 and n. 76. Elsewhere, however, he takes *stirps* rather differently, as the proper technical term for the *plebeian quasi-gens* only. Msr. iii. p. 9, n. 2 ad finem; p. 27, n. 2 and p. 318.

⁶⁸ Tricostus, Tricipitinus, &c. On the suggestion of legend by ancient monuments see Pais, Anc. Leg. pp. 161, 162, &c. The Porta Trigemina was possibly a remnant of Etruscan domination. See Dennis, Cities and Cemeteries of Etruria (1878), ii. p. 144, on Volterra.

⁶⁹ e.g. Imperiosus, Corvus, Torquatus, Livy, 7. 4, 10, 28. For Buteo, Pliny, H. N. 10. 8. 21. As to the doubtful representative of the bird on Fabian coins, Patin, Familiae Romanae, p. 108; Cohen, Desc. Gén. i. p. 135.

sufficiently remarkable to require a separate notice to itself, in Appendix 1 to § 5.

Now and then we find in the *cognomina* matter of indisputably genuine historical record, relating to some public service or munificence⁷⁰.

Attainment of high office, particularly by persons of a rank previously incapable of holding such office, becomes a not uncommon family "achievement." In some of these cases very interesting and difficult questions arise, some of which are treated in the Appendix (to § 5) above referred to. In the particular case of titles allowed to victorious generals⁷¹, such as Messalla, Africanus, &c., a statutory restriction was made, some little time after these titles came into use⁷² that they should descend only to the eldest son. Otherwise the cognomina seem to have passed regularly in general agnatic descent.

The division of the gens into separate Houses, and redivision again of those Houses themselves, accounts for a vast number of cognomina, and is at the same time an argument for the possibility of a traceable agnatic descent among those bearing them. This possibility we may, I think, venture to assert for the early Republican period, with which, or the still earlier Regal, we are alone concerned, in our investigation of the elements of the Roman constitution and law. With the later extended use of the cognomen as a mark of "gentility," in the modern sense, provincial

⁷⁰ For the Fabii Maximi see Livy, 9. 46: for the Pictores, Pliny, H. N. 35. 4. 19.

⁷¹ I do not take into account the L. Sergius *Fidenas*, whom Livy (4. 17) "supposes" to have got his name from the part that he took in the war against the Fidenates. The actual honours of the occasion were taken by others—a Cornelius and an Æmilius (Livy, ib. and c. 20).

⁷² In 240 B.c. Mommsen explains the occasion for this regulation in Msr.³ iii. p. 213, n. 3. The date is due to the very general statement of Dio quoted in Forsch. i. p. 53, n. 82 as "Fr. 44 Bekk."

(above, p. 119, n. 65) or official, which occupies the latter fourteen or fifteen pages of Mommsen's article I have not here to do.

In the earlier historical period, which we may consider at any rate to include the wars with Pyrrhus and the Carthaginians, a certain control was no doubt exercised by the Censors over the proper style and standing of the citizens whom they had to enter in their lists⁷³. But in that of the juristic development of law, to which our legal records mostly belong, it cannot be asserted that the bearing of the same cognomen constituted agnatio, or gave any preferential right of succession, without actual proof of descent from a common ancestor⁷⁴.

In the final words of the decemviral clause which has been here considered, familiam habento, familia is, of course, used simply in the sense of Property. It has nothing to do with familia in the larger sense as meaning a body of Persons (see above, § 3, p. 53).

Cognatio signifies natural or blood relationship reckoned either through father or mother. It is, as a term, not to be found in our acknowledged fragments of decemviral or predecemviral law. Whether, as a fact, this bond of union was recognised before the separation of the Indo-European races, is a matter of controversy⁷⁵. It certainly seems to have been so, in Roman law, or custom, for the purpose of determining what nearness of relationship was a bar to marriage⁷⁶. It was also, according to Cato, regarded as entitling, or com-

⁷⁸ Msr.³ iii. pp. 212, 213.

⁷⁴ See Msr. iii. p. 17, where I think Mommsen's correction, in n. 1, of his previous statements in the Forschungen, should be limited to the later period.

⁷⁵ Girard 5, p. 148, n. 1. See also above, § 2, p. 44.

⁷⁶ Gaius, i. 61. See Roby, R. P. L. i. p. 128. It is in this point of view that *cognatio* is considered a matter of universal law (*jus gentium*). See Papinian, Dig. 48. 5. 39. 2: also Savigny, System, i. p. 341, n. d.

pelling, to the exaction of blood-revenge, for severe personal injury to a relation (above, p. 111, n. 34). The passage above quoted, from his Origines, contains the earliest use that I know of the word cognatus. It may well be an extract from the Twelve Tables⁷⁷, the style of which, in the above provision for inheritance by agnati (p. 109) it so closely resembles.

In this case, of the right or duty of revenge by blood-relations, Jhering perhaps makes out such duty or right to be more distinctly the affair of the gens at large, than is justified by the authorities. But there is certainly much to be said for some early recognition, in the Roman polity, of cognati and affines, as concerned in such matters, perhaps also in the consilium domesticum or necessariorum (see § 3, p. 55), besides the narrower circle of agnati⁷⁸. This point will be more fully treated with regard to certain modern nations in the Appendix to the present section. At Rome this is possibly one of the indications of two stocks on slightly different stages of agnatic development (see § 3, p. 87; § 6, pp. 234 sqq., 245; § 7, p. 255).

In what we may call the comparatively historical period cognatus occurs continually, e.g. throughout the plays of Plautus, with the general sense of "relation."

When the conception of the family, as based upon blood-relationship, began to prevail over the narrower civil law idea, in judicial recognition, we know not. The Praetor's bonorum possessio, under the clause unde cognati, must have been subsequent to the development of the Edict, in the second century before our era: indeed it would seem that

⁷⁸ See Klenze's Familienrecht der Cognaten und Affinen, and generally the note of Prof. Goudy referred to in n. 77.

⁷⁷ Prof. Goudy, in his note 44 to Muirhead, ² p. 35, denies this, on the ground that the decemviral penalty for os fractum was pecuniary. But see Gellius, 20. 1. 14. Si membrum rupit, ni cum eo pacit, talio esto, Cato, l.c. and Gaius, 3. 223, also above, p. 116 and below, § 20, p. 614.

it was still in an imperfectly developed state even in the earlier part of the next century, at the time of Cluentius' succession to his mother's brother⁷⁹.

Affinitas, relationship to the kin of a spouse, is not generally recognised by the Jurists until the latest period (of Ulpian, Paulus and Modestinus). In the special case of the closest relationships of this kind (wife's mother, son's wife, &c.) it constitutes a forbidden degree even in Gaius' time⁸⁰; but it need scarcely be further considered here.

Sacra familiaria. Festus distinguishes between publica sacra, performed for the whole people at public cost, and privata, which were performed on behalf of individuals, familiae, and gentes⁸¹. The first of the three privata do not concern us here⁸²: on the third I shall have to speak in the following section (§ 5, pp. 139 sqq.).

Of the sacra familiaria we know very little. For a statement by Rivier that they were "primitively" common to the wider circle of cognati, but confined by the Pontiffs to that of the agnates⁸³ I can find no evidence. They were most probably in some manner varied (heraldicè "differenced") from the gentile sacra, which is perhaps all that is meant by the above statement. The interest in their preservation appears, in Cicero's eye, to be the same. See § 5, p. 142.

However differenced, adopted, or prescribed by the common ancestor, they must have constituted an important bond of union, giving the *familia* a quasi-corporate character (but see below, § 5, p. 152).

⁷⁹ Cicero, pro Cluentio (B.C. 66), 60. 165. See Girard⁵, p. 848.

⁸⁰ Gaius, 1. 63, 64. See Poste, p. 49.

⁸¹ Festus, F. p. 243, Publica: see also Livy, 5. 52. 4.

⁸² In a doubtful reading of Cicero, de legibus (2. 8. 19), ritus familiae patrumque servanto (cf. ib. 11. 27) he may mean by patrum something distinct from the sacra familiaria: but I prefer to think the word merely pleonastic.

⁸³ Rivier, Fam. Romaine, § 8, p. 35.

The only actual instance that I can find recorded, depends upon a mutilated passage of Festus, which has been variously supplemented, but leaves enough MS. reading to show that it does speak of sacra familiaria belonging to the gens Claudia⁸⁴. The Lar familiaris, who occurs frequently in Plautus, is the god of an individual household or House and has nothing to do with the familia in the larger sense. Neither have the sacra familiaria generally, described in Marquardt or Daremberg et Saglio, which appear to be ordinary domestic festivals.

Tutela. The subject of agnatio is, as has been previously stated. Introduced by Gaius, in his Institutes, simply as one of the Investitive Facts of tutela, which (or rather its converse relation of pupillage) is treated by him as a Personal Condition.

The first kind of tutela (testamentaria), mentioned in the Institutes, does not appear to be there expressly described by Gaius as an enactment of the Twelve Tables, though an exception from the general principle of tutela is 86. The name of statutory is actually given by him to that of the agnati, who are, by the Code, appointed to be tutores, failing appoint-

⁸⁴ Festus, F. p. 343, Saturno. See Müller's supplementum and Msr.³ ii. p. 35, n. 1. These sacra, of which we know otherwise nothing, may have been merely general gentilicia: on the other hand a great gens like the Claudia might have numerous familiae with special varieties of cult. So the sacrificium statum genti Fabiae of Livy, 5. 46 (see § 5, p. 145) is thought by Marquardt (Culte, i. p. 159, n. 3) to have been special to the familia of the Dorsuones. Perhaps there is a similar case in the Caesares of the gens Julia, see § 5, App. 1. p. 181.

⁸⁵ Jurisprudence, ii. p. 468.

se The freedom, from tutela, of the Vestals, Gaius, 1. 145. His words, however, are not irreconcileable with a pre-existent privilege. Testamentary tutela is attributed to the XII by Pomponius, Dig. 50. 16. 120: Ulpian, 11. 14: Paulus, Dig. 50. 16. 53. pr. and Gaius himself on the provincial edict, Dig. 26. 2. 1. It is possible that he may have changed his views in the Institutes, and come to regard testamentary tutela as predecemviral customary law. See Karlowa, ii. p. 273, above, p. 105, n. 5; Gaius as cited in the next note.

ment by will⁸⁷. I need not enter again into the question whether the *agnati* were *themselves* called into being by the XII (above, p. 111).

Tutela, as is well known, applied, from the earliest times, not only to impuberes but to women of all ages, who were not under potestas or manus (above, § 3, p. 84), and it is perhaps this lifelong female tutelage which throws most light on the original intent of the institution generally. The uncomplimentary reason popularly given, for their ladies' treatment by the ancient Romans⁸⁸, is challenged by Gaius as unreal, and the intended control is shewn to have been, by his time, practically evaded89. The original intent is obviously indicated by Gaius himself90 to have regarded rather the interest of the tutor, as a presumptive heres of the ward, if intestate, than of the latter. This view, of ancient tutela generally, has been of late supported by Dernburg⁹¹ but opposed, at great length, by Karlowa⁹². I am myself (above, p. 113) decidedly of Dernburg's opinion, and am glad that Girard also speaks of the primitive character of tutela, as established in the interest of the tutor93.

With the later conception of tutela, and the gradual process by which it passes, as Moyle says⁹⁴, from that of right to that of duty, we have not here to do, being simply interested in its original connexion with agnatio. The ultimate remainder to the gentiles, on intestacy, has been

- 87 Gaius, 1, 155.
- 88 Dating from Cato according to Livy, 34. 2, and Cicero (pro Murena, 12. 27) down to Ulpian (11. 1) and Bishop Isidore, Origines, 9. 8 ad finem.
 - 89 Gaius, 1. 114, 115, 190; 2. 122.
- 90 id. 1. 165, 192. See too Q. Mucius, Dig. 50. 17. 73. pr. Quo tutela redit, eo et hereditas pervenit, nisi cum feminae heredes intercedunt.
 - 1 Dernburg, Pandekten, iii. § 39.
- ⁹² See particularly ii. p. 272. Cuq (i. p. 310) is evidently of the same opinion as Karlowa.
- ⁹³ Girard⁶, p. 206, quoting Ulpian, Dig. 26. 4. 1. pr. See also Jhering⁴, ii, p. 462.
 - ⁹⁴ Moyle⁵ on Just. 1. 13, pp. 147, 148.

partially treated above, but the subject will be resumed in the next section⁹⁵.

In favour of the above view, as to the original object of tutela, may also be adduced a prevalent opinion that tutela merely concerned the property, not the person of the ward. This view is strongly held by Karlowa, who, I think, satisfactorily explains such statements as tutor personae non rei vel causae datur⁹⁶; but fails to do so in the passage of Paulus where the tutor's charge over the mores of his pupil is spoken of⁹⁷. The introduction, too, by Gaius, of tutela into his first Book, certainly looks as if he, at the time of compiling the Institutes regarded this as a Personal relation⁹⁸. On tutela furiosi Varro, de R. R. 1. 2. p. 41 (ed. 1533)^{98a} should be added to the authorities previously quoted.

Tutela patroni. This tutela is definitely mentioned by Gaius in the two passages quoted above, in support of the principle stated generally by Q. Mucius (n. 90). It is there put by him as a consequence per interpretationem⁹⁹ of a direct enactment in the Twelve Tables that the hereditas of a freedman is to go to his patron and patron's family, if he dies intestate leaving no suus heres¹⁰⁰. This last named enactment would, I must confess, appear to me a very improbable provision for so early a date as that of the Twelve Tables. But the phrase usually cited from Ulpian as decemviral¹⁰¹ appears distinctly to prove the occurrence of

⁹⁵ On comparison of Gaius, 3. 17 with the supposed contents of the lacuna at 1. 164 see Muirhead, p. 120: Muirhead's Gaius, p. 63: Poste's Gaius, p. 104.

⁹⁶ Marcianus, Dig. 26. 2. 14: Karlowa, ii. pp. 272, 287.

⁹⁷ Dig. 26. 7. 12. 3. See however his very ingenious argument, p. 271.

⁹⁸ See Jurisprudence, ii. p. 481.

⁹⁸a (Is qui vult colere) mente est captus atque ad agnatos et gentiles est deducendus.
99 See too Ulpian, 11. 3.

¹⁰⁰ This, which is added in Gaius, 3. 40, is merely omitted from the general statement of 1. 165 because the main subject of the latter is simply the tutela.

 $^{^{101}}$ See Schöll, XII Tab. Rell. p. 131, "Ex ea familia" inquit (lex) "in eam familiam." Ulp. Dig. 50. 16. 195. 1.

that provision in the Code: this was evidently believed in by the Jurists, and a passage of Paulus refers to words of the Twelve Tables which do clearly speak of the relation of patron, or patron's family, and freedman¹⁰².

Affines, or relations in-law, to use the English phrase, have nothing to do with Roman succession, although they are often, in treatment, coupled with cognati, as by Klenze in the work referred to above (p. 123, n. 78). Affinitas, like cognatio, was a bar to marriage, though, in Roman Law, it only extends so far as this quasi-relation resembles that of parent and child103. Further gradus do not seem to be recognised, in this point of view, though in familiar usage they have proper names given them 104. The Canon Law considerably extended the prohibitions of marriage on account of affinity 105, in which it was followed by our own 106 until they were by the legislation of Henry viii reduced to such as depend on the "Law of God" or the Levitical degrees 107. The prohibitions retained were afterwards expressed in a Table set forth in 1563, which still subsists in our Common-Prayer Book, and is valid except so far as altered by the Deceased Wife's Sister Marriage Act 1907.

the Bishop of Rome" against which 32 Hen. viii. c. 38 is directed.

¹⁰² Vat. Frag. 308, sicut in XII tabulis patroni appellatione etiam liber i patroni continentur &c.

¹⁰⁸ Or "lineal ancestor and descendant": compare Modestinus, Dig. 38. 10. 4. 4, 5 with Paulus, 38. 10. 10. 7.

¹⁰⁴ Modestinus, l.c. § 6.

 ¹⁰⁵ So Rivier, Fam. Rom. p. 45, n. 1. See however Decr. Greg. 4. 14. 8.
 106 See the complaint about prohibitions due to the "usurped power of

¹⁰⁷ Compare the Statute above cited with 25 Hen. viii. c. 22, § 3 and 28 Hen. viii. c. 7. In an early edition (6th) of Stephen's Blackstone (p. 242, n. p) I find an attempt to explain the words "God's law except," as distinguished from the express prohibitions of Leviticus (chaps. 18, 20); brook the reasoning of the judges in the famous decision on Brook v. Brook (9 H. L. C. pp. 231, 232) clearly takes the law of God spoken of in the Statute of Henry to be that law as specifically interpreted by English Statutes. See generally Reeve (Finlason), iii. pp. 253, 254 and Blackstone, i. p. 435.

APPENDIX TO § 4

WERGILD and cognati, Teutonic and Scandinavian, p 129. English maegth, healsfang, &c., 131. Conclusion, 133. Valuable suggestion of Miss Phillpotts, 134.

Wergild and cognati. The case, contemplated in the northern customs considered by Miss Phillpotts, is usually, not as in the law of Numa (supra, n. 34), that of accidental homicide. Whatever may have been the treatment of that, what we have mostly before us, in her book, is slaying either in hot blood or with deliberate intent; so that we do not hear so much of the slayer making or requiring amends, as of kindred doing so, at least in the earlier law of Iceland and Norway (see above, n. 50a). He is understood to be outlawed and his goods forfeited. The point for our consideration is the classification of paying or receiving kinsmen.

It is, as will be seen from Miss Phillpotts' last chapter, extremely difficult to generalise from her researches in the social antiquities of these Teutonic or Scandinavian nations, considered merely upon her own special thesis—the cohesiveness of kindreds. I find it still more difficult to do so, when I employ these researches with a view to my own rather different question—the prevalence, or not, among those nations, of agnatio in the strict Roman sense. It is not merely that the terms, of agnate and cognate, are unknown, but that the classification of kinsmen, for the purposes of wergild, only coincides in a very general manner with the stricter Roman division. Members of the family (sensu moderno) generally come in the first class, as to claim and liability. With these are sometimes associated agnatic

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uncles, nephews and first cousins; sometimes such direct agnates as father's father and son's son come only in a second class; sometimes we hear, in what seems to be a re-enactment of customary law, of the first persons to act being the paternal and maternal relations, so that the nearest in kinship may be a first cousin generally, agnatic or not¹⁰⁸.

In Denmark it is admitted that "there is no differentiation between agnates and cognates 109." In the more properly Teutonic countries, such as North Germany and Holland (to pass over Schleswig which has in great part a Danish or Jutish character) we come, in Holstein, to the somewhat exceptional case of Ditmarschen, cited as a special example of agnatic organisation. The corporate character of the slachte, as evincing the solidarity of the kindred, is strongly put110 as an argument for an agnatic basis. It is true that here the creation of artificial relationship by the use of adoption, and the fact of the slacht being often a confederation of minor groups, bear a remarkable likeness to the historical facts, and to some theories of the formation, of the Roman gens. Still I cannot quite go as far as Miss Phillpotts' conclusion that these groups "must have been formed on an agnatic basis," at least in the exact Roman sense; which conclusion seems to me to depend on somewhat à priori reasoning (see below, p. 134). The close corporate character of the slachte may, I think, be accounted for by their participation in the making and maintaining of the great dykes 111 to which they owed their richest land: nor can I perceive in the proportionate division of, and liability for, wergild much more than nearness of relationship, in the ordinary sense, with a general preference for the sword over the spindle side 112.

See Phillpotts, pp. 49, 50, 51, 68, n. 3.
 id. pp. 125, 126.

id. p. 79.
ii id. p. 247, n. 2.

¹¹² id. pp. 127, n. 3; see also p. 143, n. 1.

In Belgium and Northern France there is apparently too much confusion on this subject, from the variety of sources' and the interference of feudal principles, for us to draw any very definite conclusions.

English maegth, healsfang, &c. The same is true, to a considerable extent, of England. The laws, however, are, as is right, chronologically treated by Miss Phillpotts, the earlier ones being correctly regarded as an attempt to state existing law, rather than as new legislation¹¹³. The question turns mainly upon the interpretation of the much disputed word maegth, which is translated by Bosworth, with a convenient comprehensiveness, "tribe, folk, nation, family."

Derivationally, so far as its derivation can be traced or inferred, it includes relationship in the widest sense¹¹⁴. In the earlier laws, down to Aethelstan, while there is little or no idea of any collective or corporate character in the maegth, and there is considerable difficulty, from the participation of the King, the King's representative¹¹⁵, or the Lord, there is, so far as I can see, no classification of the individual maegas or kinsmen. Neither is there any indication of this in the well known passage (of Aethelstan) which is relied on by those whose special object it is to prove the solidarity of the kindred in England. As that is not the particular here in question, I shall pass by that passage with the sole remark that the "strong and mickle" maegth, against which the

¹¹³ id. p. 205. Liebermann's article Sippe, in his Wörterbuch to the Anglo-Saxon laws, classes the uses of words, maegth for instance, under his own heads of meaning: which of course is very helpful but does not give the gradual development of a meaning so well as Miss Phillpotts' treatment.

¹¹⁴ Extending even to affinitas (above, p. 128). Kluge indeed holds its proper signification to have been originally relationship by marriage (s.v. Mage: see also Skeat, St Mark in Gothic, Glossary, s.v. Megs).

¹¹⁵ This I take to be the meaning of gesith in Ine, 23. 1 on the authority of Phillpotts and, I think, of Schmid, 5. 599. Liebermann (Wörterb., s.v.) makes the share of the wer to be taken by der Genossenbund.

Londoners may have to ride, is evidently a *local* group, consisting, probably, in part of persons nearly related, in part of persons very distantly so, or only by name and repute, in part of mere retainers; a group which like the original Roman *gens* might occasionally act together, but can scarcely be conceived as a corporate unity¹¹⁶.

In the century before and immediately after the Norman conquest, when Dane and Saxon had settled down in peace or joint submission 117, there are more frequent references to the maeath and the individual maeaas, and decided traces of Scandinavian influence, in the English laws; but no definite specification of the persons entitled or liable to payment of bloodmoney, until we come to the remarkable fragment styled as "on wergild118." In this, which appears to be a comparatively late resumé of the subject, the liability of giving security for the payment of wergild falls on both paternal and maternal relatives, but in greater proportion on the former. This is to be followed by their joint oath that the King's peace shall be kept¹¹⁹. To the 1/10th praecipuum of the wergild, which is called healsfang, only children and paternal relatives 120 are entitled. To whom the remaining 9/10 are to go, is not stated, but I have no doubt Liebermann is right in saving the persons above named divided it with the other kinsmen, in a wide sense 121.

¹¹⁶ Aethelstan, 6. 8. 2. See Phillpotts, pp. 216—218: P. and M. ii. 240—242.

¹¹⁷ Phillpotts, pp. 209, 210, 214.

¹¹⁸ In Sohmid², Anhang vii. p. 395. See Einleitung, p. xxiii. In Liebermann, Wer, i. p. 392: the document is dated by him between 944 and 1060.

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¹²⁰ Healsfang gebyreth bearnum, brôthrum and faedran. The last word is translated by Schmid and Miss Phillpotts (the latter with some question, see p. 243) father's brothers, and Liebermann has in his translation, p. 393, Vatersbruder [-brüdern?]. Why may it not be simply father, dat. sing. from a form faedera, which is given by Schmid? For the explanation of Lieber-

mann's expression praecipuum, see Gaius, 2. 217.

121 "Theilten mit der Sippe." Liebermann.

The "full friendship" which the slayer may go on to obtain 122 is apparently a reconciliation with remoter connexions who might be understood as bearing a grudge, though not definitely entitled to share in the wergild 123.

Conclusion. I cannot do better than finish the subject, as treated in the Anglo-Saxon laws, with the conclusion drawn by Liebermann¹²⁴, that the agnatically organised family, though not entirely absent, is generally connected, in operation, with the cognates. To which may be added a significant admission by Miss Phillpotts¹²⁵ that there would have been no question of a solidarity, greater than that of the immediate family, among the Anglo-Saxons, but that students of our early institutions half-consciously sought the explanation of terms and ideas elsewhere (than in England).

A great part of her Conclusion (ch. viii) is taken up with the consequences of the survival or otherwise of kindred cohesiveness as against the opposite feudal tendency. It is the last section, on the prehistoric group, with which my subject is alone concerned.

In the majority of cases treated, the distinction of father's kinsfolk and mother's kinsfolk is recognised, with a greater amount, in general, of claim or liability for wergild, in the former class. But the strict and exclusive distinction, in Roman law, of agnatio from cognatio, is to all intents and purposes unknown. The exception, if it is an exception, of

125 Phillpotts, p. 243, cf. p. 234.

^{122 § 6, 1. (}Liebermann, i. p. 392.) Something of the same kind is indicated by Seebohm (Tribal Custom, p. 251) when he speaks of persons beyond the normal wergild but sufficiently nearly connected in other ways to make them dangerous if left unappeased.

¹²³ All renderings in this very difficult passage are given with the greatest deference. I have not ventured to translate *Healsfang*, but incline to accept what I take to be Liebermann's idea of it, as so called from the *embrace* of reconciliation.

¹²⁴ s.v. Sippe, Wörterbuch, p. 652. He is commenting on Chadwick's assertion that it (agnatic organisation) is wanting altogether in the laws.

Ditmarschen, is accounted for, by Miss Phillpotts herself, on what I have ventured (above, p. 130) to call à priori reasoning. Her dilemma 126, that we must either deny that the primitive group was capable of holding land, or suppose it to have been determined by matrilinear descent, does not appear to me to settle the question either of the larger familia or the gens: but its consideration belongs more to the latter subject and to that of joint ownership or occupation as against private Property (§§ 5 and 5A).

Miss Phillpotts' following section, however, on the kindred and the cult-community, contains an interesting and valuable suggestion, on what she calls the "arrested development" of the Teutons into agnatic clans, as connected with the merger of a prehistoric ancestor-worship into a common cult of Odin. Conversely, we may reasonably connect the preservation of agnatic tendencies, at Rome, with the observance of sacra familiaria, which had certainly more or less to do with deceased ancestors¹²⁷.

On the whole, I think myself justified in arriving at the conclusion, so far as relates to the cases which have been adduced as parallels to the Roman agnatio, that although a so-called agnatic tendency may be made out in a general preference for the paternal over the maternal relations in the particular subject of wergild, no proof is to hand of the specific doctrine of agnatio in the strict sense; which I am therefore inclined to believe a special Roman institution arising from the old rigid law of manus¹²⁸.

¹²⁶ Phillpotts, pp. 269, 270.

¹²⁷ See above, on sacra familiaria, pp. 124, 125.

 $^{^{128}}$ See the valuable caution in P. and M. ii. 238—241: also above, § 3, pp. 74, 75.

§ 5. THE GENS

THE gens of the Roman Jurists and Niebuhr, p. 135. A. Historical facts, 138. Common sacra, 139. Sodalitates (postponed), 142. Conclusion, 144. Joint occupation of land, 146. Residuary inheritance, 148. Gentile tutela, 149. Enuptio gentis, 150. Fecennia Hispala, ib. Bloodfeud, 153. No definite corporate action of gens, 154. Conclusion, 156. Double gentes, 157. B. Theories. Origin and original condition, 158. Comparative priority of gens and family, ib. Actual descent from a single ancestor, 159. Hebrew Patriarchs, &c., 160. Lyall's Rajputana tribes, 161. Recruiting by adoption, 162. Parallel of English township and Indian village community, 163. Etymological evidence from Roman Gentile names, ib. Sodalitates, 165. Probable true origin of gens, 168. The δεκάδες of Dionysius, 169. Alleged Etruscan origin of the gens, 171. Conclusion, ib. Appendices. I. Gentes. Testimony of Fasti, &c. 173. II. Totemism, 187. gens and the earliest Teutonic gild, 191. IV. The Anglo-Saxon hundreds and tens, 195.

The gens of the Roman Jurists and of Niebuhr. The Roman gens was undoubtedly regarded by the Roman Jurists as analogous to the larger familia, which descended from a single ancestor. This idea is widely prevalent, though not perhaps universal, in the early associations of other old nationalities, particularly those which are supposed, mainly on the ground of cognate language, to have sprung from one common stock (see above, § 1, p. 5). It would

¹ Ulpian, Dig. 50. 16. 195. 4, where he applies the term of familia to what we generally consider a fairly extensive gens (the Iulia). See too Jhering, i. p. 183. It may however be questioned whether Ulpian is not identifying this gens with the familia of the Caesares, see § 4, n. 84 and below, p. 182.

seem necessarily to assume the patriarchal, or at least the patrilinear, principle (see § 4, p. 111). The association, however, is earlier than any real record, and various theories are held by moderns as to the historical origin of the gens and its actual relation to the larger familia, which has been partly considered in the last section and will be returned to towards the close of the present. One of these theories, however, as running counter to the general Roman idea of the gens may be taken here. Niebuhr, according to Karlowa, considered the gentes as artificial (künstlich) creations, combinations of families unrelated to one another, which were instituted for the object of a certain political and military organisation2. This view certainly appeared to me to convey very erroneous notions unworthy of the great author quoted. On looking, however, into the original, I find that the chapter of Niebuhr, which is mainly founded on Dionysius' second book, while it does in rather a misleading manner call attention to some stray assertions of non-relationship, does not really ignore the fundamental belief in the nature and origin of the gens, as stated on the preceding page (see however below, p. 170).

There are two conflicting influences that one has to take into account, in any attempt at framing a hypothesis as to the amount of fact underlying the accounts which our historiographers, such as Dionysius and Plutarch, give us of the earliest Roman constitution. One is the obvious comparison of the infant Athens, very much transformed as it must have been, in historical times, by the perfectly intelligible reform of Cleisthenes. Another is the mixing up, with the real survivals of antiquity, assertions due to quite late writers, who had the existing state of things both at Rome and in the recent history of Athens before their eyes, such as the so-called grammarians, to whom we owe many interesting and occasionally valuable details, but usually put together

² Karlowa, i. p. 32, &c.

without any regard to order of time or natural developement. The introduction of such matter has no doubt had its effect even upon the great and profound historian above named; in whose sketch, for instance, of the Roman curiae and gentes, the family origin, or theory of origin, appears somewhat to be unduly ignored, an appearance, however, more discernible in his successors and admirers than in himself. On looking at the original of Niebuhr's Geschichte, and comparing it even with so excellent a translation as that of Hare and Thirlwall, I think it will be found that the artificiality of the ultimate elements of the so-called Romulian constitution consists rather in the arrangement of them, so as to harmonise with a legislator's scheme, than in the elements themselves3. But this is my own view. which I may be wrong in imputing to Niebuhr, and which is, in more express terms as follows:

- 1. The remote origin of the gentes may be the result of the rude military organisation of a conquering tribe, and their subsequent occupation of the conquered territory. But the growth of the gentes, and their association into curiae, must have been originally automatic and irregular. The reduction of these elements into the system that survived into the Republic, is of course later than the union of the three tribes, which there is reason to connect with the establishment of complete Sovereignty in an Etruscan family.
- 2. Such a scheme is inconceivable and unintelligible for an original founder, whether demi-god, hero, or mere man. It is quite conceivable and even probable for a later ruler, whose natural object is to put into some definite organisation the evidently discordant elements which he has, for the first time, united under one authority. The meaning of this
- ³ Compare words to this effect in Niebuhr, i. p. 262, ed. Isler, with Hare and Thirlwall, i. p. 274. The translation, e.g. of *Innungen*, said by Niebuhr of the gentes, as corporations, is, at first sight, though literally correct, somewhat misleading in spirit.

thesis will be made more clear in the section on the "Romulian" tribes.

According to the more general modern belief, the Roman gens was something self-formed or grown—not made4. By the Romans themselves it was considered, as its name, like so many of its Aryan parallels, indicates, to be a kin5. The relationship, however, of its component familiae, though here and there traditionally referred to some prehistoric ancestor, is, with more careful writers, little more than a presumption based upon the bearing of a common gentile name⁶ by persons of free descent and unimpaired status?. The last clause which is a somewhat loose translation of the words of Cicero, indicates a condition, probably introduced by the Pontiff Scaevola, in order to limit the number of gentiles who might, under the old law, claim to participate in an inheritance ab intestato8. There must have been no passing out of the individually original familia, traceable in his ancestry 9. This is, I think, the meaning of Boethius' not very clear explanation of the passage in Cicero's Topica 10.

A. Historical Facts. In our earliest trustworthy records, the gens appears as composed of a number of familiae in the larger as well as in the smaller sense. The former are occasionally traceable from historical individuals possibly related to one another, but with regard to the gens as a whole there is no attempt at proof of any general relationship; the common ancestor being, in the majority of cases, an obviously late invention (see below, p. 160). On the

⁴ Msr.³ iii. p. 10, n. 3: Jhering⁵, i. p. 248: Karlowa, i. pp. 32, 33.

⁵ Curtius⁵, p. 175: Corssen², i. pp. 435, 436.
⁶ Msr. iii. p. 11.

⁷ Festus, P. p. 94, s.v. *Gentiles*: Cicero, Topica, 6. 29. Gentiles sunt inter se, qui eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt deminuti. Hoc fortasse satis est.

See § 4, p. 117.
 Jurisprudence, ii. pp. 458, 459.
 Boethius in Topica, 6. 29.
 See however Karlowa, i. 33, 34.

other hand, there are certain historical facts connected with the *gentes*, to which I shall for the present confine myself.

Common sacra. One of the most striking and persistent of these is the union in some particular religious worship. In this, which was probably in ancient times regarded as a natural result of common descent, I think we must rather see a main bond of original association, as would appear to be the case also in the Greek $\gamma \epsilon \nu \eta^{10a}$.

Recorded Latin instances are: the worship of Minerva

10a The γένη and φρατρίαι, which we know mostly as Attic, are, like the Roman institutions above mentioned, treated as already existing in the Lycurgean ρήτρα, evidently coeval with the beginnings of the Lacedaemonian polity. They most likely existed, in fact, from a time prior to any history, all over Greece. The yeun were, like the Roman gentes, groups or associations of families, often supposed to be descended from a common ancestor, and were, from the first, connected by special sacred rites. The antiquity of this bond (from which results that of joint festival and burial), is recognised in the note of Servius on Aen. 3, 407 referred to below (n. 11). It is perhaps better evidenced by the old term opycores, which appears to have indicated the members of a yéros, but which required explanation in the literary period of Greece. There is a passage of Suidas referring to a "law of Solon" probably that quoted below, p. 165-όργεωνες οι θύται Σέλευκος έν τφ ύπομνήματι τῶν Σόλωνος ἀξόνων ὀργεῶνας καλεῖσθαι τοὺς συλλόγους ἔχοντας περί τίνας ήρωας ή θεούς. Of course these όργεωνες may be, and have been, explained otherwise (see below, l.c.): but when we find them described in the Etym. M. (226) as κοινωνίαν έχοντες συγγενικών όργίων ή θεών, άφ' ών όργεωντες ώνομάσθησαν...άπ' άρχης κοινά ίερα έχοντας we certainly feel inclined to identify, or at least compare, them with Hesychius' γενν ηται... ἄνωθεν ἀπ' ἀρχης ἔχοντες κοινὰ ἰερά. In the law of Solon which has come to us (below, p. 165, n. 99) δργεώνες does not occur, but a genitive without construction lepων δργίων. Niebuhr proposes to add γεννήται, which is accepted by Meier (de gentt. Att. p. 26). Some other substantive, such as θύται, would be more likely, supposing the three words to be a gloss, part of which has supplanted an original δργεώνες, followed by η γεννήται. The questionable ναθται has been supposed to be connected with the well known ναυκραρίαι, which however are generally taken to mean households. I know no authority for this law (which is treated as genuine by Petit) other than the quotation of Gaius. There is a somewhat similar connexion of names in Isæus, de Men. her. § 14. είς τοὺς φράτορας...καὶ είς τοὺς δημότας καὶ...είς τούς δργεώνας.

by the Nautii¹¹, that of Hercules by the Pinarii, a historical gens which is represented as originally connected, on inferior terms, with an extinct gens Potitia12 and that of Apollo by the Julii¹³. The two former cases probably record a real persistence of peculiar gentile worship, although some suspicion may be thrown on the matter by the introduction of Trojan legend into the first, and by the bolstering up of the second with a false derivation of the Pinarii: the third is much more questionable and has, to my mind, an appearance of later courtly invention. Of unquestionable antiquity, on the other hand is the ancient shepherds' festival of the Luperci, i.e. the Wolf-wards, and the rites connected respectively with the Quinctian or Quinctilian gens (see below, App. 1), on the Palatine, and the Fabian on the Quirinal, whether the latter were exclusively the function of the Fabii Dorsuones or not14.

There is a difficulty in the worship of the Sun or Dawn, which, according to Festus (or Paulus), appertained to the

¹¹ Descendants, according to Servius, ad Aen. 5. 704, of a Nautes specially taught by Pallas. From the same commentator, on Aen. 3. 407, we have a rambling story of this Nautes receiving back the Palladium, returned by Diomedes (Servius, Thilo and Hagen, i. 411, 642).

¹² See Festus, F. p. 237, Potitium et Pinarium: Virgil, Aen. 8. 269, 270 and Servius' note (T. and H. ii. p. 234): Macrobius, Sat. 3. 6. 12—14, and Livy, 1. 7; 9. 29. The last cited passage, from its connexion with Ap. Claudius Caecus, seems to give a quasi-historical character to these Potitii: but the question is discussed elsewhere (Appendix I. p. 184). Appius' blindness is, no doubt, a fact (Cicero, de Senectute, 6. 16), out of which political adversaries would be ready to clap a judgement on his back.

13 Servius, ad Aen. 10. 316. T. and H. ii. pp. 426, 427. In this strange note we are told that all who are "from their mother's womb untimely ripped" were consecrated to Apollo, and that this accounted for his sacra being retained by the Caesares, such being one of the explanations of this name. The extension to the whole gens Julia—in fact the whole attribution of this worship is probably later than the greatness of the Caesares. On that gens and familia see however App. 1. p. 182.

¹⁴ See Festus, P. p. 87, Faviani et Quintiliani. For the picturesque story of C. Fabius Dorsuo see below, p. 145 (Livy, 5. 46): on the possible later recasting of the ancient worship of both gentes, below, p. 168.

Aurelii, a gens of Sabine origin, to whom a site was expressly assigned by the Roman people for their performance of these sacra¹⁵. For this we must note is a plebeian gens¹⁶ whereas the races named in connexion with old sacra are generally patrician¹⁷.

Special worship and places of worship, special sepulchres and holidays were no doubt a common feature with all the older *gentes* ¹⁸, though we only hear particularly of a few, from individual stories which have been preserved.

Mommsen and Karlowa press, somewhat strongly, the distinction drawn by Festus¹⁹, or rather Gallus Aelius, between sacra which remain privata, and those which are adopted ex instituto pontificum, and which become thereby themselves publica, though the place to which the Pontifis assign their performance does not become sacer. This rather subtle distinction may be seen, I think, to agree with that of Festus himself²⁰ in another passage, in which publicly consecrated places corresponding to national local divisions, seem essential to the sacra which are fully publica and performed at the public expense. It is not impossible that a good deal of the older Roman religion was a developement, or tacit adoption, of ancient gentile sacra, such, e.g., as those of the Quinctii and Fabii, connected with such early local divisions as the montes and pagi mentioned in Festus'²¹ last

 $^{^{16}}$ Festus, P. p. 23, $Aureliam. \$ The passage is given in full below, Appendix I. p. 179.

¹⁶ It shares the consulship with a Servilius in 252, 248 B.C. See too Livy, 23. 30. plebeii ludi aedilium M. Aurelii Cottae et M. Claudii Marcelli.

¹⁷ This difficulty and similar ones, requiring a more lengthy consideration, must be referred to in Appendix 1.

¹⁸ Macrobius, Sat. 1. 16. 7.

¹⁹ Festus, F. pp. 318, 321, Sacer (ad finem). Msr.² iii. 19, 20: Karlowa, i. 34.

²⁰ Festus, F. p. 245. Publica sacra quae publico sumptu pro populo fiunt, quaeque pro montibus, pagis, curis, sacellis, at privata, quae pro singulis hominibus, familiis, gentibus fiunt.

²¹ See Mommsen's History (Dickson, 1901) i. ch. 3, p. 45; ch. 4, p. 63.

quoted note. The idea of a new cult being entrusted to the charge of a particular gens, as in the alleged case of the Aurelii, is, to my mind, one of later character than the primitive worship assigned to them; and I should prefer some such explanation as that suggested in Appendix I (p. 180). In the comparatively late, but still early, times to which I have referred above, a definite authoritative recognition of some special cult being left in the charge of a particular body is apparently a historical fact. The ring of patrician gentes was most likely closed at an almost prehistoric period, see § 9, p. 314: but the gradual admission of plebeian families to the position of a gens or quasi-gens by Pontifical authority is obviously to be connected with some developement of new sacra or modification of old22. It is perhaps not too fanciful a parallel to compare the modern English nouveau riche getting a grant of arms, whether he differences those of some old family, or honestly works out an "achievement" of his own. The still more recent case, as I venture to regard it, of a sodalitas created sacrorum servandorum causa will be considered later on (below, p. 167). Anyhow, whether from remote customary connexion or definite Pontifical adoption, the gentile sacra generally had become²³, in what Cicero regards as the good old times of the Republic, matter of public concern. The national policy or belief, on the subject, in this period, appears to me to be well expressed by Jhering. The People was responsible to the Gods for the conduct of its individual members, whose sins, of omission as well as of commission, were liable to be visited on the community. Hence the regulations made by the Pontiffs, on the devolution of an inheritance or the transfer of a property by arrogation, for the maintenance of the private rites of the gens²⁴. In Cicero's second Book de

²² See Msr.³ iii. pp. 74, 75.

²³ Cicero, de legibus, 2. 9. 22; pro Murena, 12. 27. ²⁴ Jhering⁵, i. 269.

legibus there is probably a great deal of his own composition, but the three or four words sacra privata perpetua manento²⁵ may be taken as expressing what was undoubtedly the constitutional convention which had come down to him.

At the same time the dictum "nulla hereditas sine sacris" (of which I do not know the author) is, within historical times, too general. An instance, at the end of the Republic, of a familia which could not be proved to belong to any gens is to be found in the laudatio Turiae which is put by Mommsen between U.C. 746 and 757²⁶.

A passage, preserved by Priscian²⁷ from Cato's Origines, is evidently only cited for the grammatical form Arpinatis = the later Arpinas. Without context, therefore, it seems doubtful whether this can be very confidently relied on, as it was by Niebuhr, to prove a jus singulare of Arpinum, that heredem sacra non sequuntur; but it may possibly indicate that, in this, and perhaps other, municipia, there might be no gentilicia sacra at all. On sine sacris hereditas see below, p. 144.

The uninterrupted performance (perpetuitas) of the gentile sacra was apparently ensured, in the earlier times of the historical period, by visitation with personal disgrace, on the part of rigid Censors, for flagrant neglect of this family duty²⁸. It is possible that it was ordinarily secured by the

²⁵ Cicero, de legibus, 2. 9. 22. The subsequent chapters 19 and 20 are an amplification of this general dictum according to the ideas of a more developed "jurisprudence."

²⁶ See however Bruns, i⁷. p. 322. ²⁷ Priscian, 4. 4. 21 (i. p. 153, Krehl).

²⁸ As in the case of Cato and L. Veturius (Festus, F. p. 344, stata sacrificia). The sacrifices which Veturius had left unperformed are, no doubt rightly, taken by Mommsen (Sr. ³ ii. p. 381) to be gentilicia. Cato's expression capite sancta is startling, though caput is certainly sometimes very vaguely used (see Jurisprudence, ii. p. 458). It possibly points to some express provision in a will, under which Veturius took, that, in case of his not seeing to the sacra, improbe factum iri. Müller's emendation caste is too feeble for consideration. Another inducement may be added in the old allowance of the extraordinary usucapio lucrativa of an inheritance—which Gaius himself stigmatises as improba—ut essent qui sacra facerent. Gaius, 2. 52—55.

sacra gentilicia, or familiaria, being made a condition of inheritance on the part of some member of the particular body. Yet, as early as Plautus, we have the expression sine sacris hereditas for any lucky windfall²⁹, and the mention (it is true in a somewhat suspected play) of the senex coemptionalis, a needy person of great age, employed something in the same way as the Common Vouchee of our old Recoveries³⁰, to get rid of the share of responsibility for sacra incumbent on a gentile heiress³¹. This particular evasion of a "common law" obligation is not mentioned in Ga. 1. 114, which only specifies that of female tutela as the object of coemptio fiduciae causa³²: but the charge of sacra upon the members and inheritances of a gens seems to have lasted, at least in legal theory, till after the establishment of Christianity³³.

Conclusion. On the whole it would seem that in the case certainly of the older *gentes*, and probably of the *gens* generally, the connexion of common religious rites was regarded as of the essence of the institution. The obligations as well as the rights, resulting from this connexion were,

²⁹ Capt. 4. 1. 8; Trin. 2. 4. 83. See Festus, F. p. 290, Sine sacris.

³⁰ Joshua Williams, R. P. ch. 2, p. 40.

a Plautus, Bacch. 4. 9. 52. The evasion is obviously performed by the capitis deminutio minima (Jurisprudence, ii. pp. 458, 459) of passing out of her own family (? rather gens) into that of the coemptionator, presumably not only old but also a man of straw. So Mommsen, Sr. 3 iii. p. 21, n. 2, who calls the senex a bejahrten Geschlechsgenossen. In Cicero, ad Fam. 7. 29, he seems to be a slave. I therefore think that, in Curius' letter (Cicero, l.c.) reference is rather made to the manumissio sacrorum causa described in Festus, F. p. 158, Manumitti, and p. 250, Puri. See Karlowa, ii. p. 139. In Cicero's own oratorical passage pro Murena, 12. 27, it is the former use of the senex coemptionalis that is intended. In Livy, 3. 72, by the way, senex concionalis (an old windbag) is clearly the right description of Scaptius, not coemptionalis.

³² Compare his general statement of the desuetude of the jus gentilicium, with special reference to the ultimate gentile right of such tutorship, in 3. 17.

⁸³ Generally dated by the official cessation of Christian persecution under the edict of Licinius, 313 A.D. See Clinton, Fasti Romani, i. p. 364. The later references to the *sacra* in Th. Cod. 12. 1. 7, 320 A.D., Fr. Vat. 248, 330 A.D., etc., use the word merely for *potestas*. Dirksen, Manuale, s.v.

in a sense, several as well as joint. They were evidently treated as resting not merely on the body as a whole, or on the individual families (in the larger sense) composing that whole, but upon each head of a household, possibly upon each male member of the gens. There is apparently a proper time for the sacrum, and a fixed place, sometimes serving the same turn for several different gentes34. But we do not hear of any common priest for the gentilicia, which could apparently be performed by any two or three members or even, on emergency, by a mere cadet of what was, in a well known instance, most probably not the leading familia of the gens. The former possibility is directly suggested in the naïve comments of Dionysius upon one of the accounts, which had been handed down to him, of the Fabian disaster at the Cremera³⁵. The latter is to be inferred from Livy's romantic story of C. Fabius Dorsuo passing through the besieging host of Gauls to perform the due sacrifice of his gens upon their "holy hill," the Quirinal36. A few other cases, mostly of comparatively modern suggestion, which hover between joint and several action of gens or gentiles, will be referred to below (p. 154).

It is, for my present purpose, unnecessary to enter into the truth or falsehood of the picturesque stories cited above. The legend of the Cremera is specially criticised by Pais in the 9th Chapter of his Ancient Legends, where everything except the bare fact of a probable Roman defeat, in that quarter, is attributed to some religious topographical element,

⁸⁴ Cicero, de Harusp. Resp. 15. 32.

³⁵ Dionysius, 9. 19. ήρκουν γάρ αν και τρεῖς η τέτταρες ἀφικόμενοι συντελέσαι ὑπέρ τοῦ γένους όλου τὰ lepá.

³⁶ Livy, 5. 46. Sacrificium erat statum in Quirinali colle genti Fabiae: ad id faciendum C. Fabius Dorsuo, Gabino cinctu sacra manibus gerens...in Quirinalem Collem pervenit. Being called (c. 52) adulescens, he may have been technically regarded as the head of a household, but scarcely of the familia of the Dorsuones. Neither is the latter likely to have been the leading familia of the gens—compared, for instance, with the Vibulani.

or to copy of Greek history. Suffice it that the practice and obligation of gentile worship were evidently a subsisting reality, commanding some credence for such stories, in the time of writers like Fabius Pictor³⁷, who is, very probably, suggested by Pais as their author.

Sodalitates, attributed to Numa or Servius Tullius³⁸—which, however, in the latter case, seem rather to be distinctly trade gilds—existed also in connexion with a special cult, and are, in fact, stated to have been instituted, even before Numa, expressly retinendis Sabinorum sacris³⁹. These Associations, which do not appear to make any claim to mutual relationship or common descent (see however, n. 10^a on $\delta\rho\gamma\epsilon\hat{\omega}\nu\epsilon_s$), may throw some light upon the question of the actual historical origin of gentes⁴⁰; but, as lacking the fundamental idea involved in the name of the latter, will be postponed to later consideration (see below, p. 165 and App. III).

Joint occupation or ownership of land. Most modern authorities are agreed that an original unity or proximity of residence may be confidently inferred for members of at least the older gentes⁴¹. Among the names known to us of the original curiae, which are always understood to be composed of gentes, one—the old Pinaria (above, p. 140)—is distinctly gentile, while they are, for the most part, clearly local⁴². But more conclusive evidence is furnished by the undoubtedly gentile names of all the old rural tribes, which we know to have been local districts, but one. The exception is the Clustumina, which, conversely,

³⁷ c. 200 B.C. See Pais, Anc. Leg. p. 178.

Plutarch, Numa, 17: Florus, Epitoma, 1. 6. 3.
 Tacitus, Ann. 1. 54. See however Hist. 2. 95 and above, p. 142 and below, p. 167.

⁴⁰ So Karlowa, ii. pp. 62, 63. ⁴¹ See however Karlowa, i. pp. 34, 35. ⁴² Mommsen, Tribus, p. 210; Forsch. i. 106, n. 78. To the names in the last cited passage should be added *curia Tifata*, also apparently local, whether meaning of the Hill or the Oak wood. Festus, P. s.v. p. 49 (cf. ib. p. 366, *Tifata*, and Corss. i. 162). See also below, § 9, pp. 321 sqq.

is local in name but, in persistent tradition, connected with the assignment of a definite territory en bloc to the only gens, the Claudia, of whose entrance into the patrician circle we have any account⁴³.

But as to the tenure or ownership of land within this original area of common residence, very divergent views are held, all of them more matter of hypothesis than of inference from historical facts, of which we have extremely little evidence.

Mommsen suggests that at some prehistoric time a gentile territory was exclusively owned by the gens as a whole44. Karlowa⁴⁵ on the other hand does not consider an original private or several ownership excluded (by the idea of the old local tribe named after the patrician gens), and cannot find any trace of property belonging to the gens as a "juristic unity," nor even of any common enjoyment of gentile land, though he allows a subsisting joint ownership of an individual set of gentiles arising from an actual or probable common descent (ib. pp. 351, 352). This latter view appears to me the more tenable of the two, partly because the idea of a juristic unity seems rather an anachronism for so early a time as the origin of gentes, and partly because it agrees with my own attempt to reconcile the statement of Dionysius referred to in a later part of this section, with the traditions of Romulus' military settlement, which are supported by old technical terms (see below, p. 170).

The ownership of land by the *State*, as a corporation or body (ager publicus), does not seem to me precisely parallel, nor do we know exactly how soon this conception was developed (see below, § 5A, p. 218). I need scarcely say that no arguments, either as to ager publicus or common gentile

⁴³ Msr. 3 iii. p. 26: Karlowa i. p. 91: Suet. Tib. c. 1: Liv. 2. 16.

⁴⁴ Msr.³ iii. pp. 16, n. 1, 22 and 25.
⁴⁵ Karlowa, i. p. 35; ii. pp. 350, 352.

land, can any longer be drawn from the exploded interpretation of the Anglo-Saxon folc-land as land owned by the people⁴⁶.

As to any allegation of the residuary ownership of an intestate's estate at Rome arising from actual common descent, if it is meant by Karlowa⁴⁷ to go further than proveable agnatio, it must be remembered that, while admitting the general idea of relationship pervading the word gens and its congeners (above, p. 135 and § 1, p. 17), we cannot but regard the traditional ancestors of gentes (frequently eponymous) as not only, in general, obvious fictions, but often comparatively modern fictions, connected for instance with the story of Troy, and probably far later than the Twelve Tables⁴⁸. Common descent, therefore, can scarcely have been specifically recognised as a ground for the residuary inheritance theoretically admitted but practically ousted by the clause of the Code discussed in the last section (p. 109).

Jhering ⁴⁹ differing slightly from the view adopted by Karlowa, holds that some individual ownership of land by *gentiles* existed from the beginning *besides* a common gentile territory. With this view I am myself, as indicated above, disposed to agree. But the whole subject of common or individual ownership of land, in the beginnings of Rome, is best treated later in an independent section (5a).

Residuary inheritance. To return, however, from modern theory to historical evidence (if I may venture to treat the Twelve Tables as such). That Statute, according to Gaius, failing any agnatus, calls the gentiles to the inherit-

⁴⁶ P. and M. i. p. 39.

⁴⁷ When speaking of Sippe as compared with Haus, ii. p. 881.

⁴⁸ In form, the patronymic character prevails more extensively among the Greek names of $\gamma \ell \nu \eta$, but query whether it expresses any more real popular belief.

⁴⁹ Jhering⁵, i. p. 200.

ance of an intestate. The gentiles are forthwith dismissed with a mere reference to his first Book⁵⁰. I venture to think that, even with this very careful and accurate writer, no great force is to be given, in a casual and perfunctory notice, to the word vocat, as any argument against the gentiles inheriting as of right (see § 4, p. 117). The words of the Statute, which Ulpian purports to quote, and their probable intent, have been sufficiently discussed in the last section (pp. 109, 110). We have seen that these words, taken literally, give the residuary inheritance to the gentiles generally, but how such an inheritance would have practically worked we cannot tell. A suggestion that they may have been directed or empowered, by the Statute, to select a heres out of their number⁵¹ cannot, I think, be accepted, in default of any evidence. On this suggested quasi-corporate action, however, of the gentiles see below, p. 154.

Gentile tutela, of which Gaius most probably proceeded to treat in the illegible part of the MS. following 1. 164⁵², and the cura or potestas over a madman's person and property, depend upon the same principle as the agnatic rights of a similar kind⁵³, and require no further remark here, except that, more definitely than in the case of simple succession to property, does some joint or corporate action of the gentiles seem, in this case, to be necessary, for the

⁵⁰ Gaius, 3. 17: the passage referred to (1. 164a) is illegible in the Verona MS. except for a few unconnected words. I must admit, however, that *vocat* is said of the *gentiles* by Ulpian (above, § 4, n. 24).

⁵¹ This suggestion, the authority of which I am unable at present to trace, is based on the word *heres* following the supposed lacuna in Ulpian, Coll. 16. 4. 2. See the last note.

⁵² Poste's Gaius⁴, on 164^a, p. 104. But the principal authority as to the enactment of the Twelve Tables on gentile *tutela* is the somewhat loose and inaccurate passage of Cicero referred to in § 4, n. 24. Agnatum gentiliumque is, however, cited by Paulus (Dig. 50. 16. 53. pr.) as a genuine decemviral expression.

⁵³ See § 4, pp. 125, 126.

appointment of an *individual* tutor or curator⁵⁴. To this subject, however, I shall return presently.

' Enuptio gentis. That a woman's marrying out of her gens was originally subject to some restriction, or required some authorisation, beyond that depending on the ordinary authority of a father, would certainly appear from the two or three passages in which the word enubere and its derivative enuptio occur. It has been suggested that this was to preserve purity of race and certain biblical instances have been urged in support of the view (e.g. Isaac's own marriage as distinguished from that of Esau): but I am inclined to prefer a more economical reason, see n. 62. Puchta⁵⁵ held that such marriages may have been in the oldest times absolutely forbidden; Mommsen, that they originally required a resolution of the collective gentiles56, or even of the whole community⁵⁷. All our knowledge of this subject comes from the strange story of Fecennia Hispala narrated in the 39th book of Livy, which, though it has some features undoubtedly belonging to a much later period than that of the Sctum de Bacanalibus (186 B.C.), furnishes us with much interesting information as to the condition of the Roman woman in ancient times, and inter alia her relation to her gens and familia, as known or believed by an author of the Augustan period.

I must leave the tale, of enforced courtesanship ending in an almost motherly affection for a young admirer, to be read in Livy: and confine myself to the alleged public grant with which, *inter alia*, Fecennia Hispala was rewarded for her

⁵⁴ See Jhering⁵, i. pp. 185, 186. The supposed custody over lunatics, in a similar Attic case, has been supported by the well-known anecdote about Sophocles: but this Meier (p. 19) considers to be misunderstood, being really a case of adoption.

⁵⁶ Puchta, Institutionen¹⁰, i. § 39, p. 76.

Mommsen, Forsch. i. pp. 9, 10, n. 5.

⁵⁷ Msr. 3 iii. 21.

information against the Bacanalian devotees or profligates. It is given below⁵⁸.

Now it is almost certain that so sweeping a supersession of the old tutelary authority as the tutoris optio could not possibly have been developed, when the old system of the legis actiones had scarcely begun to be broken down⁵⁹. We can, however, use the passage in Livy to shew what were the ancient disabilities of a woman in Fecennia Hispala's position which a choice of tutor (and command of his auctoritas) would remove.

She was not in manu: had she been so, as is justly remarked by Muirhead, the sanction of the gens, for her passing out of it, and into the manus of a husband belonging to another, would not have been required. The tutor petitus a praetore ad testamentum faciendum (l.c.) I regard as equally anachronous with the tutor optivus, but it is not necessary to enter into that point here. As to the fact of her being a freedwoman, I cannot agree with Jhering. that the original restrictions on passing out of gens or familia are likely to have been confined to this class: they are more likely, as Mommsen points out, to have been more stringent in the case of the free born woman, to prevent her withdrawing herself and her property out of the gentile circle and control.

The disabilities, then, of a woman, freed or freeborn, in tutela, are the converse of the powers given or purported to

⁵⁸ Livy, 39. 19. Senatus consultum factum est...ut Fecenniae Hispalae datio deminutio gentis enuptio tutoris optio item esset quasi ei vir testamento dedisset.

⁵⁹ Gaius, 1. 150—152, 190: Poste⁴, pp. 110, 111. The ἄπαξ λεγόμενον manstutorem in Truc. 4. 4. 6 is quite inadequate to prove such an optio in Plautus' time.

⁶⁰ Livy, 39. 9, 19: Muirhead2, p. 109, n. 3.

⁶¹ Jhering⁵, i. p. 197, n. 90: Cuq more correctly says (i. p. 171) *même* les femmes affranchies ne pouvaient sortir de la *gens* sans un décret des *gentiles*. See too Mommsen, Forsch. i. p. 10, end of n. 5.

⁶² See M'Lennan, P. T. p. 245.

be given, to Fecennia by Livy's senatusconsultum. Datio is generally understood to mean free disposal of property. To this the sanction of the statutory Tutor was necessary: in the case of the later kind of tutor he was bound to give this sanction even against his will⁶³. Deminutio has been explained (very feebly) as arbitrium bona diminuendi. I believe it rather refers to a removal of some restriction on passing e familia in familiam (see § 4, note 101), which constituted, as we know, a minima capitis deminutio. This may have been within the same gens, as distinguished from gentis enuptio passing by marriage out of the gens altogether. How these restrictions were enforced, or specially relaxed, we do not know.

There is no very clear proof of any corporate action either of the familia or the gens: nor do I exactly understand the reasoning of Mommsen who seems, in the later of the two passages referred to (n. 57), to require a consent of the whole community to an enuptio gentis⁶⁴. Livy winds up his grant to Fecennia with an optio tutoris which I venture to consider an anachronism, though the appointment of a fixed tutor, to persons in Power, may be even predecemviral (§ 4, p. 111). It is possible that, in the genuine old law, the tutor, testamentarius or legitimus, actually exercised the veto, which we must infer from the story of Fecennia to have existed, upon marriage of a woman ward out of her familia or gens.

I have purposely avoided the words Exogamy and Endogamy on account of their connexion with practices and rules belonging, as it seems to me, to far more elementary racial conditions than those of the earliest Roman gentes (see however, App. 11). M'Lennan's suggestion, that marriage between the members of a Roman gens was anciently forbidden, is somewhat inconsistent with his views about

⁶³ Gaius, 1. 190, 192; 2. 118, 122.

⁶⁴ Mar. 8 iii. p. 21, n. 1.

Agnation cited above 65: what little we have about enuptio gentis points distinctly the other way. That among early Roman marriages, of the traditional times, there is an absence of unions of people within the same gens, if true 66, may be accounted for by the fact that the only marriages involving special interest, and therefore likely to be recorded, would probably be those between different gentes or even between order and order.

The above mentioned properties and incidents of the old Roman gentile association are about all that can be regarded as true, from their partial survival into historical times: the theories or suggested origin of that phaenomenon are matter of pure hypothesis and, as such, will be postponed to the end of this section. In the intermediate part I have collected various alleged facts with reference to the Roman gens, which appear to me to rest on little or no satisfactory evidence: one, which is somewhat better supported does not as far as I can see, belong to the gens, but to a circle of true relationship, like agnatio, only more extended.

Bloodfeud, and the exaction of pecuniary or vindictive satisfaction for death or personal injury, was dealt with at considerable length in the last section, because it has been frequently coupled with the Agnatic group in the Roman sense. It has been shewn that the alleged grouping connected with this principle (agnatio), in our Northern nations, does not conform to the strict Roman definition of agnati, and that in Rome itself the persons really connected by these rights and duties belong to the wider circle of cognatio or blood relationship⁶⁷. A suggestion, by

⁶⁵ p. 151, n. 62. See now M'Lennan, P. T. pp. 119, 207, 245.

⁶⁶ The passage quoted (ib. p. 207) as anecdoton Livianum from the lost 20th Book turns on a question of nearness of relationship as a bar to marriage and a relaxation of the stricter original rule.

⁶⁷ Above, § 4, p. 123, and App. p. 134. See too for the Greek parallel, § 9, App. p. 347.

Karlowa⁶⁸, of the extension of such rights and duties to the still wider circle of the *gens* is not at all improbable for ancient usage, but has not, that I am aware of, any trustworthy evidence to support it.

Corporate action. Jhering supports the view, which is on the whole adopted by Karlowa, that some sort of corporate action by the gens is historical. He adduces occasional reputed instances of common aid to a member in distress, and suggestions of maintenance and approval on the one hand, or boycott on the other, in which exclusion from the sacra would seem to approximate very nearly to conscious action of the body as a whole⁶⁹. To the same effect are his inference of the necessity of such action for the appointment of a tutor (above, p. 150) and Mommsen's suggestions of a similar proceeding to sanction the separation of a new familia, or a woman's enuptio gentis (see above, p. 150 and § 4, p. 120). But most of the cases referred to, which are often, as it seems to me imagined rather than recorded, point as much to several as to joint action, and look more like matter of friendship, neighbourhood, or the general local juxtaposition of the original gens than any historical survival of gentile action as such.

The same author enlarges considerably upon an almost unique instance preserved to us of a posthumous condemnation of the memory of an unworthy member by his *gens*, and its *decretum* that none of the patricians among them should henceforth bear his *praenomen*⁷⁰. The inference, he says,

⁶⁸ Karlowa, i. p. 36. There is some evidence, from historical practices that the Attic γεννῆται were connected by duties and rights arising from homicide of or by one of their body, see Demosth, c. Aristocr. 643, 644.

⁶⁹ Jhering⁵, i. pp. 187—193: see too Cuq, i. p. 71 and notes.

⁷⁰ Jhering⁵, i. pp. 190—193. The case of course is that of Marcus Manlius. See Livy, 6. 20: Cicero, Philipp. 1. 13. 32: Festus, F. p. 151. (There is a vague story of the *praenomen* Lucius being repudiated by *consensus* of the patrician gens Claudia. Suetonius, Tib. c. 1.) On the apocryphal character

has been, somewhat unhesitatingly, drawn, of a similar power of exclusion during life, and of the exercise of this moral police force, as he calls it, first within the patrician gentile constitution, then within the united state as a whole, to find its ultimate operation in the Censor's nota which he considers to be a final "efflux of the Family principle."

This (valeat quantum valet) is the only ancient evidence of any Roman gentile judicature or legislation. Of any assembly of the gens, for such purposes, I can find no clear trace, nor of any gentile council of elders or fathers, though something of the kind seems to be assumed by modern authors.

of the whole story of Manlius I need not dwell (Pais, Anc. Leg. pp. 112, 113 and n. 20, p. 304). The practice of passing such a decretum is attributed by Gellius (9. 2. 11) not particularly to this gens but to the "Ancient Romans" generally. The word used is the technical censuisse.

71 There is more authority for this, so far as analogy goes, in antiquities of early Greece. In a Scholion to Hesiod, Op. et D. 493 (ed. Vollbehr, p. 190), we read of 360 λέσχαι, agreeing in number with the Attic γένη, where certain sacrificial forms were gone through, in order to prosper the debates of those who met there. These λέσχαι appear to be literally Parliament Houses (see however Curt. 5 p. 364, § 538, as to some difficulty in the derivation The λέσχη was, with the Boeotians (Etym. M. s.v.), a common dining hall, a resort of loungers, as early as Hesiod's time (l.c.). At Sparta it was according to Plutarch (Lycurgus, c. 16) a council-room where the elders of a φυλή decided whether each particular infant should be reared or not. That he can here be speaking of a Council or senate of the three great Dorian tribes seems unlikely; and a possible reaction of Roman tradition upon gossiping recorders of Greek antiquity is suggested by me elsewhere (§ 9, App. p. 345). But, so far as analogy is to be taken into account, as quasi-evidence of corporate action by the Roman gens, it does seem probable that the old Attic yeun, possibly the Greek yeun generally, may have had their judicative or legislative meetings. In φυλή too, so far as can be inferred from the oldest uses of the word, and from cognate terms (see § 9, App. p. 334) there is more support for the idea of common action than in the Roman traditions of the gens. It is in the Indian village community that we find the most small and elementary phaenomena of local administration under the village council. In early England we have them for the larger hundred, but not clearly for the tun, still less for the maegth. See P. and M. i. pp. 18, 19.

The few early limitations upon parental or marital authority appear to involve, as we have seen (§ 3, pp. 56, 75, 76), a half obligation to refer cases for an extreme exercise of such authority to the five nearer male neighbours, or a court of kinsmen, but not of gentiles, eo nomine. And the sanctions both of the paternal power and of its limitations, depend upon the common feeling of a larger society, than either the familia in its widest sense or the gens⁷².

Of any joint military action by a gens, there is no historical record, unless we accept the picturesque story of the fatal expedition of the Fabii to the Cremera⁷³. This, I fear, can no longer stand against the criticisms of Ihne and Pais, the striking resemblance to Greek story and the suspicions of the usually credulous Dionysius⁷⁴. Nor does the legend itself afford much indication of belief in a military headship of the gens, as an ordinary institution. It is simply the Fabius who happens to be one of the Consuls, that heads the expedition. Lastly the decurio of Dionysius, so far from being the head of a historical gens is merely the captain of Romulus' original military decad⁷⁵, the possible developement of which into a gens is one of the doubtful hypotheses which we have shortly to consider⁷⁶.

Conclusion. Some slight continuance of corporate gentile action may perhaps be inferred from circumstances

⁷² See § 3, pp. 51, 52. Compare, however, Muirhead², p. 68.

⁷⁸ Livy, 2. 49: Pais, Anc. Leg. ch. ix. ⁷⁴ Dionysius, 9. 19.

⁷⁵ See Msr. 3 iii. p. 104, n. 5. Neither in Greek antiquity is there any very clear trace of a gentile head man, whether priest or chieftain. See, however, for an dρχων of the γϵνο 3 4 μν 3 μν 3 μ 3 μος Ross, Demen von Attika (cited by Grote (ed. 1888), ii. p. 429, n. 1). The plaintiff in Demosthenes. Eubulidem, was elected φρατρίαρχος; but it is not likely that any office of importance would have been given to a person of such doubtful ancestry (pp. 1304, 1305). Cf. the case of the petty magister curiae, § 9, p. 322.

⁷⁶ Below, p. 169. Jhering, I may remark, seems rather to accept this hypothesis in his oracular note 78 to i.⁵ p. 184. The later municipal decuriones (see § 8, p. 286) do not concern us here.

attending the Servian reform, but this is pure inference. Neither in historical nor quasi-historical times can I find reliable traces of such action: the *gentes* have been absorbed into the curiate *populus* before we have any trustworthy record of them.

In the Private Roman Law of later times, under Praetorian and Juristic treatment, the gens appears to me to play little or no direct part, except in the explanation of rare and isolated transactions such as I take arrogatio⁷⁷ to have been. But in the earlier developement of that law, it has an important, if indirect, influence as an element of Constitutional Structure, which we have seen (above, § 1, p. 1) to be, especially in the Regal and early Republican period, unavoidably connected with the more proper subject of the present work. The gens will therefore recur in subsequent sections as a constituent of the curia (§ 9) and as the principal feature in the well-known division into Orders (§ 7).

Double gentes. Before, however, I quit the historical facts connected with the gens, I must advert to one remarkable legend, which has some distinctive features connected with it, that cannot be ignored in speculating on the probable origin of that institution in general. I refer to the story of the Claudii, given more fully in App. III to § 16. This is one of the cases where the same gens has, in historical times, a patrician and plebeian branch, between whom it is possible that no love was lost (§ 16, App. III. p. 563). It is probable that the plebeian branch was formed out of original clients, ib. and § 7, p. 263, to whom a grant of land was made, on their arrival, different in amount to that assigned to the patrician element as represented by Appius Claudius or Atta Clausus himself:

⁷ Gaius, i. 99. See Gellius, 5. 19. 5, 6 who gives it (§ 9) a regular formula. This is obviously of the John Doe and Richard Roe character, and may be a mere text-book writer's invention: but the adoption of Clodius, in 59 B.C., was a real transaction, though perhaps an artificial revival. See Cicero, de domo, 29. 77. (Arrogatio is treated at length in §§ 10 and 14.)

and this original clientela will probably account for most of the plebeian *gentes* which are doublets of patrician. For the rest another principle must be sought (§ 7, p. 269).

B. Theories. Origin and original condition. These, as distinguished from the approximately historical facts treated above, are in the main matter of pure inference or hypothesis, and will probably remain disputed points to the end of the chapter. The subject, however, is too interesting to be omitted, if only on account of possibilities suggested by the obvious parallels between this obscure portion of the Roman story and that of other Aryan races, as to which we have something a little more like historical record.

I leave out of the question here M'Lennan's theory of the gens or Clan preceding the Monandrous Family, as a stage of developement from that earlier and ruder condition, to which reference has been made above (§ 2), and which I believe to be non-Aryan. A few words, on a suggested Totemic origin of the gens, in accordance with M'Lennan's or Bachofen's views, will be added below, in an Appendix, but at present I have only to speak of the gens as a developement of the Monandrous principle, or an aggregate of Monandrous families.

Comparative priority of gens and family. So far as any direct evidence approaching to historical extends, I can see very little ground for giving priority to the gens or the family: for saying that the gens is an association of families or the family an inner growth within the gens (see App. II. p. 187). My reasons for assuming the Monandrous family as primeval in Aryan races have been given in § 2. But both gens and family appear at the earliest dawn of most credible tradition: and both generally as parts of some larger association, except perhaps in the unique case, if still alleged as an actual case, of the Hebrew Patriarch (see below.

pp. 160, 161). A relation suggested as possible between the Roman *gens* and the Roman *tribe*, which is anticipated below (p. 170) will be more fully worked out in § 6, pp. 243 sqq.

Actual descent from a single ancestor. Of possible origins suggested for the gens or clan, by those who, like myself, start with assuming the Patriarchal Family, the one which was, for a long time, most favoured, was actual descent from a single male ancestor. This view is finally, I think, rather preferred by Mommsen, and perhaps by Girard, who quotes a somewhat ambiguous passage of Ulpian on the subject 78. Such descent was, no doubt, proveable for many familiae (in the larger sense), and possibly so for some small gentes of comparatively late formation. In support of its general truth as to familiae, we may cite names obviously denoting some personal mien, habit, peculiarity79 or exploit80 of the founder. A few gentile names, mostly plebeian, seem to point in the same direction⁸¹. The two instances last mentioned in the notes are remarkable, and will therefore be specially considered in Appendix 1. pp. 176, 180. The numeral names, varying from 5th to 10th, and possibly last82, may denote the formation of new houses by cadets of enterprise83. Of course we must generally rule out eponymi such as Iulus, Volesus, &c., or founders who, though not eponymi, are obviously matter of Greek fable.

No argument by analogy, in favour of common descent, can be based upon those names of Greek tribes or sub-tribes which, though patronymic in form, are clearly derived from

⁷⁸ Msr.⁸ iii. p. 11: Girard⁵, p. 146, n. 2: Ulpian, Dig. 50. 16. 195. 4.

⁷⁹ See § 4, n. 65. ⁸⁰ In § 4, notes 69—71.

⁸¹ e.g. Flavia, Fulvia, Helvia (see Corssen², i. p. 100), Livia, Nazvia, Canidia, Flaminia, Antistia.

⁸² e.g. Quinctia, Nonia, Decia, Postumia.

⁸³ The high antiquity, however, of the Quinctii, as well as the spelling of their name (App. 1. n. 177) might lead one to suspect some more remote etymology.

occupation, office or locality⁸⁴. Some of the Greek family names may refer to real ancestors⁸⁵ but, in the majority, Ion and Dorus—even Thucydides' Hellen (1. 3)—with Cinyras, Iamus and Codrus, are, like Aemilius the grandson of Aeneas and Anton the son of Hercules, as obviously apocryphal as Romulus himself.

Nor can I urge, as any true parallel, the -ings of our own northern ancestors, though some of these last may mean followers, if not descendants, of the chieftain whose patronymic they appear to bear⁸⁶.

There is nothing insuperably improbable in descent of a clan from a single ancestor, within reasonable conditions of number and time, and of course the history of the early Hebrew Patriarchs occurs at once to the mind. It is not desirable here to embark on an enquiry whether the account given us is even intended to be taken as a literal historic genealogy of the people whom we subsequently find in actual association, as tribes respectively named from the sons of Jacob, and all sprung, by repute, originally from the seed of Abraham. Even if the case be taken literally, it must be remembered that the growth of such bodies from single ancestors is, as recorded, exceptional if not miraculous, and requiring peculiar circumstances of isolation in a very self-sufficing and self-contained nomad life (above, § 3, p. 51).

The somewhat idle question, whether a single family can form a State, has been considered and answered, in the negative, elsewhere (Jurisprudence, pp. 167, 168), where it was suggested that this negative depends upon rather more

⁸⁴ e.g. φυταλίδαι, βουτάδαι, βρυτιάδαι, ποιμενίδαι, χαλκίδαι. See Meier, de gentt. Att. pp. 34, 35. For Roman gentile names which are really to be compared with these see below, p. 164.

⁸⁵ e.g. 'Αλκμαιονίδαι, Διογενίδαι, Τιμοδημίδαι.

⁸⁶ Which is what Thucydides alleges of Hellen. On our place-names in -ing see Phillpotts, p. 244: below, p. 163 and App. IV. pp. 198, 205.

than the mere absurdity of scanty numbers⁸⁷, which might evidently, in the patriarchal régime attributed to the original ancestors of the Hebrew nation, amount to a formidable host⁸⁸.

A common religious belief may, as we have seen (above, pp. 139, 146), suffice to keep, in comparatively close relations, a number of families locally associated, without any actual unity of descent: whether, with such unity, it could secure the *permanence* of association required by Bentham for a State (Jurisprudence, pp. 150, 168), without the development of some definite standing authority, and some rule for the succession to such authority, may be questioned. And in these respects the parallel of the Hebrew Patriarch, or any other Oriental despot, with the *gens*, fails: since we have no clear tradition of any regular chieftain, hereditary or otherwise, in the latter⁸⁹.

There are other material points of difference pointed out by M'Lennan, enlarging upon Locke (above, § 3, n. 14), between the Hebrew Patriarch and the Roman Paterfamilias, which will apply, mutatis mutandis, to the hypothetical ancestor of a gens: but I shall not pursue the subject further here, as it is merely the suggested possible unity of ancestorship with which we are at present concerned.

More historical, or at least more modern, parallels, have however been alleged in support of this unity. Sir Alfred Lyall is quoted by Maine as authority for so-called pure tribes or clans in Rajputana, actually formed, in comparatively modern times, by genuine descent, as well as for what are termed *impure* ones, formed merely on the same model or principle⁹⁰. The formation of the latter class is facilitated,

⁸⁷ See Austin, Lect. 6, p. 237, &c. as cited in P. J. p. 146.

⁸⁸ See Genesis, ch. 14. 89 See above, p. 156: also P. J. ch. 13.

³⁰ Early Law and Custom, p. 272. For the case of enrolment in the clan or sept "not only of the founder's actual kinsfolk but of all who had any share in his enterprises" compare the suggestion below on p. 170.

according to Maine, by a religious principle that marriages must be found for sons and daughters without a certain sept or clan (exogamy) and within a larger tribe or caste (endogamy). I have no information enabling me to pronounce on these cases: I only take the statement of them, by very competent authorities, as some evidence of the bare possibility of the Roman gens being formed actually by descent and analogically on the model of a descent.

Recruiting by adoption has been suggested as a means by which a gens might be conceived as possibly traceable to a single ancestor: this theory being mainly based on the known frequent use of adoption in later historical Rome. M'Lennan points out, however, with justice, that for a family by descent to reach the dimensions of a tribe or even a clan, admissions of outsiders must have taken place on a much larger scale than we find adoption ever actually practised within a Roman gens. It may also be supposed that the gentes, when they came to form a close corporation, as they certainly at one time did (see § 6, p. 247; § 9, p. 315, &c.) would naturally restrict or regulate admission by adoption, perhaps allowed more freely in an inchoate condition of the Such an incorporation, from without, of individuals not related by blood or included by marriage, appears to have been historically subject to limitation or at least control, and the free use of adoption to have been a later innovation⁹¹. The particular control however, which we find in actual existence, would seem to have been devised in a more general interest, as subject to the approval of a larger association than the mere gens; e.g. the curia, or rather the curiate populus (above, pp. 142, 143), the formation of which is most probably subsequent to that of the gens (p. 137). And all this regulation is of a decidedly more definite

⁹¹ See Mommsen, Hist. (Dickson, 1901) i. p. 73, and Msr.³ iii. p. 38. Generally on arrogatio, §§ 10, 14.

and organised character than the vague sanctions which must, I think, be postulated for the parental power (§ 3, p. 51).

The peculiar development of the principle of agnatio among the Romans renders possible the tracing of descent in a familia, taken in the larger sense, up to a considerable period (see § 4, pp. 109, 110): but, certainly in a case of a gens of any size, adoption seems to be a perfectly insufficient hypothesis to explain its formation in this supposed patriarchal manner.

The English Township in comparison with the Hindoo Village Community (above, § 2, p. 22) has been referred to as a stage in political formation somewhat resembling the Roman gens: in the same general point of view we may take into account the Tribal system of Wales as based, or alleged to be based, on the principle of agnatio (§ 4, p. 114). But neither appears to furnish any strong support to the theory immediately under our consideration, i.e. the probability of a gens descending from a single ancestor. In fine, while admitting the possibility of such origin, particularly for the later gentes, I think it must be regarded as only one of various suggestions for the earlier, for which another theory appears to me more probable, and, in the Roman case, more consonant with old tradition as to the primal occupation and division of territory (see below, p. 170 and § 5A, p. 213).

Before leaving the subject, however, I must pay a little more attention to the etymological evidence, bearing on the origin of the *gens*, to be gathered from the general form of the Roman gentile names.

These names have certainly a quasi-patronymic character in their termination -ii or -ia resembling the Greek $-i\delta a\iota$, and the Saxon -ing (above, p. 160). But, in the case of all such suffixes, it must be remembered that though they are undoubtedly used to form true patronymics, they are quite

capable of other explanations than a supposed lineal descent, their original meaning being apparently the general one of "belonging to" or "concerned with," such meaning having sometimes, but by no means universally, a diminutive character⁹². In the majority of the Roman gentes, as in many of the Greek $\gamma \acute{e}\nu \eta$ (above, p. 160, n. 84), the nomina point, in my view, to pursuit, product and locality—perhaps emblem or insigne—rather than to any real or imagined common ancestor⁹³. In one or two instances, mostly belonging to the plebeian order, the name of a gens clearly indicates some important religious office. An explanation of this phaenomenon has been attempted below (Appendix 1, p. 176).

Some of the names enumerated in note 93 certainly suggest the idea of a trade or craft gild, and this view is quite consistent with the determinate locality which a trade usually, or at least often, has in infant states. A special theory of Niebuhr, as to the origin of the Roman gentes, will here come to be considered. I may first remark generally that the artisan character of the gilds best known to us must be borne in mind, as against the aristocratic and land-holding nature of the older Roman gentes⁹⁴; as well as the fact that the nomina indicative of manufacture are mostly found in plebeian gentes, which there are other grounds for considering to be usually of later developement. The names given to the

⁹² See Curtius⁵, pp. 635*, 640, 641**, 645, &c.: Skeat, English Etymology², i. pp. 222, 258, 259.

⁹³ See however above, n. 78. The cases intended in the text are such as Fabii (Pliny, H. N. 18. 3. 10), Porcii, Verrii, Cornificii, Furnii, Fabricii, Falcidii, Hortensii, Tigellii. The last may be local, as also Pontii, Marii and others which may be better explained, as we come to know more of the topography of ancient Rome, e.g. Caellii, Oppii, Cispii: see Karlowa, i. p. 63. Greek γένη so named, e.g. Κεφισεῖ, and Κωλιεῖ from the promontory Κωλιάς, are not relatively so common.

⁹⁴ Compare too the γαμόροι of Sicily and Argos, the generally accepted derivation and original meaning of βάναυσος, &c.

tribes in the Servian system are all patrician⁹⁵, and the only cooptation of a *gens*, of which we have any definite account, is an addition to that order⁹⁶.

Sodalitates. Niebuhr, if he really regarded the gentes as originally artificial divisions (above, p. 136), must apparently have considered them a species of corporations (Innungen) or gilds established by state authority. This is certainly not, in my view, a tenable opinion; and the passage which is, by some, relied upon as evidence for the existence of gilds at all, in the regal period, would appear to confine them to the plebeian order⁹⁷. The alleged foundation of trade gilds by Numa is, I think, rightly treated as pure fable by Mommsen⁹⁸: though he appears to admit their early existence at Rome, as indeed would seem to be proved by the enactment which Gaius attributes to the Twelve Tables with the remark that it appears to have been borrowed from the legislation of Solon⁹⁹.

This theory of the origin of the gens, if really propounded by Niebuhr, may be illustrated by a brief notice of the different kinds of gilds as instanced in a remarkable parallel—

⁹⁶ ib. p. 26, n. 1, and p. 166, n. 3. The date of this addition is generally given as that of the first Claudian consulship, 495 s.c. But see § 16, App. III.

⁹⁵ Msr. 3 iii. pp. 167, 168.

⁹⁷ Plutarch, Numa, c. 17. The strange fancy is attributed to this legislator, of facilitating the fusion of the two national or tribal elements, by redividing them into smaller groups, i.e. of mechanical trades, such as flute players, goldsmiths, carpenters, dyers, &c.; see above, n. 94.

⁹⁸ Muirhead², p. 11, nn. 2, 3. I do not think the account of the Ardean secession cited from Livy, 4. 9 is any proof of an organisation of the opifices. The whole matter looks like a mere romance somewhat anticipating that of Buondelmonti (Dante, Inf. 28, 101).

⁹⁹ Gaius ad legem duodecim tabularum (Dig. 47. 22. 4) Sodales sunt qui ejusdem collegii sunt...his autem potestatem facit lex pactionem quam velint sibi ferre dum ne quid ex publica lege corrumpant. Sed hace lex videture cx lege Solonis tralata esse: nam illuc ita est: ἐὰν δὲ δῆμος ἡ φράτορες ἡ ἰερῶν δργίων ἡ ναῦται ἡ σύσσιτοι ἡ ὁμόταφοι ἡ θιαοῶται ἡ ἐπὶ λείαν οἰχόμενοι ἡ ἐἰπορίαν κ.τ.λ. On Niebuhr's emendation of ἰερῶν δργίων and the suggested identification of ὀργεῶνες with γεννήται see above, n. 10°.

5. e

the gild system of the Anglo-Saxons and English. The former has been regarded, by a great modern authority, as a step between the family and the township or borough 100. It is here treated more particularly in connexion with the Township¹⁰¹, as illustrating, to some extent, the relation of the Roman family proper to what has been called above (§ 4) the larger familia, the gens, and the curia. In this treatment of the subject, which however brief must be relegated to an Appendix¹⁰², I wish to call attention not so much to the later developement of the Trade Gild in England, nor even to the Frith Gild, recognised in the Anglo-Saxon laws, as to the origin of the whole system in remote Teutonic antiquity, when its first bond-Religion-affords a closer parallel to the early elements of association at Rome than does that of the later Trade Gild proper; although the growing patrician character of the latter certainly recalls the Roman gentes of the earlier Republic, with their long monopoly of power and place.

It results therefore that I must dismiss the idea of the Trade Gild as constituting any origin of the older gens, though it is by no means improbable that associations of the former character may, in later times, have supplied, to the plebeian, the want of the true gentile bond, which long belonged exclusively to the patrician. Trade Gilds are

¹⁰⁰ See Stubbs, C. H. ch. 11 generally.

¹⁰¹ Stubbs expressly excludes the gild system as being the basis on which the corporate constitution of the burh was founded: the growth of the civic constitution, of what we call the towns, is either late or complicated even before the Conquest with rights resulting from tenure. What I have to consider is how far the original notion of the gild is related to the ground principle of origin in the case of the Roman gens or of the Anglo-Saxon tun itself.

¹⁰² App. II. This is mainly based on Brentano's valuable researches, on the History and Development of Gilds, published by the Early English Text Society as a preface to Miss Toulmin Smith's English Gilds. But I have, of course, not neglected to consult the important later work of Gross on the Gild merchant.

certainly more likely to have produced the *bourgeois* clubman of whom we read in Plautus¹⁰³.

The public institution of a sodalitas for the superintendence of an imported worship, might appear from the words of Cato, in the last quoted passage, to have taken place, for the first time, in his quaestorship 204 B.C.¹⁰⁴ These words, however, are not very clear, and there are stories (all perhaps somewhat questionable) of collegia formed for a similar purpose, in much more remote times ¹⁰⁵. As to the Sodales Titii, instituted by T. Tatius according to Tacitus, retinendis Sabinorum sacris, they are not even connected, by the antiquarian Varro, with the tribal division at all, but with some peculiar auspice or mode of observing the auspices ¹⁰⁶.

No evidence as to the antiquity of sodalicia can be drawn from the derivation of the word sodalis. So far as there is any agreement upon a hopeless question 107, the homely intimacy or companionship of Plautus' comici senes is considered to be the first idea expressed by the word 108.

On the whole, I am disposed to agree with Cagnat¹⁰⁹ that the *sodalitas*, when made a public institution, was often employed as a substitute for, or a supplement to, old gentile

¹⁰³ See Plautus, Capt. 3. 4. 29. Such, probably were the sodales whom the older Cato "semper habuit." Cicero, de Senectute, 13. 45.

¹⁰⁴ Compare with the passage in de Senectute, Livy, 29. 11.

¹⁰⁵ Mercatorum, 495 B.C., Livy, 2. 27: Capitolinorum in 390, id. 5. 50: of which we can only say that there were bodies bearing these names in 57 B.C. Cicero, ad Quintum Fratrem, 2. 5.

¹⁰⁶ Tacitus, Ann. 1. 54: Varro, L. L. 5. 85. Karlowa however cannot resist the temptation of applying his favourite expression *uralt* to these Titii (ii. p. 62). See also Msr.³ iii. p. 97, n. 3.

¹⁰⁷ Curtius⁵, p. 251: Vaniček, i. 382: Pianigiani, s.v. Sodalizio.

¹⁰⁸ The impossible derivations of Festus (P. p. 296, Sodales) point merely to a tradition of club-life or picnicking.

¹⁰⁹ Article Sodalicium in Daremberg et Saglio.

worships 110: but I do not think it can be regarded as, in any sense, an origin or model of the gens. The social sodalitates probably sprung from Roman trade gilds, which no doubt existed, under whatever name, before the enactment of the decemviral lex allowing any of their agreements to stand that were not derogatory to the law of the State (see the passage of Gaius cited in n. 99): and the feeling of obligation and affection as between members of such a sodalitas might be as strong as that between members of a familia or a gens, but it did not assume any relationship by common descent. In this respect, then, it differs from the gens in just the same way that the Anglo-Saxon gegyldan differ from the maegth, with whom they are occasionally coupled, as jointly entitled to, or liable for, wer, in the Frith Gild developement or utilisation of the older Gild system under the Anglo-Saxon Kinglets¹¹¹. With its later successive developement, mostly in towns, into the caste system of full or old burghers, and the consequent revolts of the counterassociations of craftsmen, I have not to do. The former, as we have seen, bear the strong resemblance of any patriciate to the old Roman monopolies of the gentes; they often retained a semi-religious character, sanctified or recommended by a common feast; but they had not the originating motive as a primary bond of union like the ancient Religious Gilds and the Roman curiae.

Probable true origin of Roman gens. The union then of individuals or monandrous families into a *gens* does not appear to have been *artificial*, in the sense in which it was so taken, or considered to be taken, by Niebuhr, except

¹¹⁰ He suggests the union of the old Fabii and Quinctiliani under the general term Luperci: to whom he adds a third class of Juliani, on the authority of Dio. 44. 6. This is possible under "the influence of the political relations of the Augustan time" (see Mommsen, Msr. 3 iii. p. 97, n. 3, and above, p. 140) but a reference to the Luperci is not quite clear.

ш See App. ш. р. 199.

for the possible basis or nucleus to be now noted (p. 170). The legendary common ancestor we may dismiss as a fiction: if it had something to do with cementing the association together, such cement was due, at least in Rome, much more to the fact of a common worship. The coalition of the original units into the gens or sept was caused most probably, as with the village community or tun, by the need of mutual protection and security, dating, as in the Anglo-Saxon case, after the settlement and dispersion of an invading tribe. And, while unity of trade or special produce may be indicated as a cause or factor in some of the later and plebeian gentile nomina, I am inclined to think that, if occurring in the earlier ones, it is rather a result of proximity of residence and similar determining conditions of occupation, than a cause 112.

The formation of the larger familiae within the gens is subject to restriction by the rigid Roman rules of potestas and manus: the peculiar rights and responsibilities, however, relating to blood-revenge, which occur in all early societies where blood relationship is traceable, were apparently further extended with them, as with our own ancestors, to the medren-maegth, but possibly not to the unrelated gentiles (§ 4, p. 116), as they were occasionally, in the case compared, to the unrelated Anglo-Saxon gegyldan.

The coalition of the original gentes into the larger association of the curia, which is specially connected with religious worship (§ 9, pp. 311, 312) I believe to have been originally voluntary, depending on special geographical conditions, external danger, or affinities of religious belief. On the suggested recasting of these various combinations into one constitutional system see the section on curia generally.

The Sekáses of Dionysius. In so far following the Roman jurists, against Niebuhr or his followers, as to con-

¹¹⁸ So the $\gamma \acute{e}\nu \eta$ are sometimes, though rarely, said to arise $\acute{e}\kappa$ $\tau \eta \acute{s}$ $\sigma \nu \nu \acute{e}$ $\delta o \nu$. Pollux, 8. ch. 9.

sider the gens a natural or voluntary, not an artificial, association, I do not of course exclude the pressure of external circumstances and the consequent trend of all early populations to form themselves gradually into self-sufficing and self-protecting bodies. At the same time, a somewhat more definite externally originative basis of local union may perhaps be accepted by those who continue, in spite of Pais' denunciations, to see some meaning in such parts of early legend as do not carry modern invention on the face of them.

Though we dismiss an individual Romulus from the region of credibility, the same marks of fiction do not so clearly exclude the probability of a real invading Host, with a rough military organisation and a corresponding parcelling out of the territory occupied: nor is there anything intrinsically incredible in such an organisation by hundreds and tens¹¹³. On the centuriatus ager of the commander or commanding body, for which Romulus stands, I shall have to speak elsewhere¹¹⁴. I merely venture here on the suggestion that the group from which the older Roman gens was originally descended may have been the $\delta \epsilon \kappa ds$ of the invading Ramnes¹¹⁵, which Dionysius treats as a civil subdivision of the whole populus¹¹⁶. The gens, if to any extent regarded as a related body, was certainly not a division of the curia; though the curia was apparently a grouping of gentes, and

¹¹³ Below, § 5A, p. 217.

¹¹⁴ Below, § 5a, pp. 214 sq. See also § 1, pp. 14, 15.

¹¹⁵ Below, § 8, p. 291. Compare too Tacitus, Germania, 6. 12, and Stubbs, C. H. i. pp. 105, 106.

¹¹⁶ After speaking of the Romulian tribe (= $\phi \nu \lambda \eta$ και τριττύs) and curia (= $\phi \rho \dot{\alpha} \tau \rho \alpha$ και λόχοs) he goes on (2. 7) διήρηντο δὲ και εἰς δεκάδας αι φρᾶτραι πρὸς αὐτοῦ και ἡγεμὼν ἐκάστην ἐκόσμει δεκάδα δεκουρίων κατὰ τὴν ἐπιχώριον γλῶτταν προσαγορευόμενος, on the last words see § 10, p. 364; § 8, p. 286, &c.

Mommsen at one time not only identified this δεκάς or decuria with a gens but the ten men composing it with the representation of ten families. But this view is considerably modified in his Staatsrecht³, iii. p. 104, n. 5, &c.

the older gentes may be reasonably supposed to have been very early worked into a systematic organisation of curiae (see § 8, p. 285).

Alleged Etruscan origin of the gens. A theory, which is certainly not deficient in originality, has been kindly brought to my notice by its author M. Charles Casati, in a reprint of a paper from the Mémoires de l'Académie Étrusque, Paris. The interesting examples adduced by him may suffice to shew that a similar institution to the Roman gens existed in Etruria, with the curious modification noted above in § 2 (pp. 42, 44), and that a certain number of gentes were common to both nationalities. He also notes a good many facts which have been considered in the present section or the Appendices to it. But I do not see that he has any amount of evidence to bring forward, beyond bare assertion, of the principle of a family nomen having been borrowed from the Etruscan race¹¹⁷. I have not, however, had the advantage of perusing this author's promised work L'Antiquité Étrusque which was to be based on the more recent information to be gathered, in Etruria, concerning this mysterious people.

Conclusion. In the above theory, as to the formation of political units in the early Roman Polity, which seems to me best to account for Roman tradition, I am, in one point, obliged to differ from Sir Henry Maine. What he considers as an association of gentes—the Tribe (§ 2, p. 23)—does rather in my view, as in M'Lennan's, come first: but it is as a rude Host, consisting already of patriarchal elements, not as a Horde of savages. The gens, in this point of view, is a subsequent developement, depending no doubt on the necessities of mutual commerce and protection, but most certainly cemented by the growth of a common religion, and the assumption of a common descent. The next larger associa-

¹¹⁷ See La gens (Casati), p. 18.

tion—the curia—has also the first and possibly the last of these three bonds of union: religion again I take to have been the principal factor, both in the formation of the curia, and in a union of curiae. It is finally in the priestly headship of this union-not, I think, in the temporary leadership of the Tribe-that we have to trace the gradual approximations to true Sovereignty which culminate in the Monarchy, if any, preceding the Tarquinian dynasty, or in that dynasty itself. I have endeavoured, in sections 6 and 7, to connect an obvious early duality of Tribes, with a racial distinction resulting in the primeval severance into Patricians and Plebeians, and am inclined to credit the third Tribe with the establishment of Sovereignty. In any case that establishment involved an artificial reorganisation of the curiate unions under something like the old tribal military arrangement. terms the lower order was included in this first Constitution it is not at all clear. But it is certain that the second or so-called Servian system was an attempt to combine both orders in a graduated system of Wealth with corresponding degrees of Service.

APPENDICES TO § 5

I. Gentes, testimony of Fasti, &c., p. 173. Gens Antistia, 175. Gens Flaminia, 180. Atilia, 177. Gens Aurelia, 179. Julia, 181. Gens Marcia, 183. Gens Pinaria, 184. Gens Quinctia and Quinctilia, 186. II. Totemism, 187. M'Lennan's view, ib. Confarreatio, 188. Exogamy, 189. Frazer and M'Lennan, ib. Hirpini Sorani, &c., 190. III. The gens and the earliest Teutonic gild. The gild a half-way-house between Family and Township or Parish, 191. Kemble, Schmid, &c., on the original gild, 192. Frith gilds, 194. Trade and Craft gilds, 195. IV. The Anglo-Saxon hundreds and tens. A secular division, 195. Vicus and tunscipe, 196. Centenarius, thunginus, mallus, 197. Hundred and wapentake, ib. Later gegyldan, 198. Relationship of smaller bands -ing, &c., ib. Frankpledge, 199, Borsholder, &c. and reeve, ib. Dionysius' δεκάδες, 200. Aethelstan, 6.3, ib. Hynden, ib. Turba, thorp, vicus, 202. Pearson, ib. Probable origin of the reeve, 203. The Anglo-Saxon tunscipe, 204. Special worship; Thorsby, Baldersby, &c., Folc and populus, 206. Relation of the ten to the hundred, ib.

I. GENTES. TESTIMONY OF FASTI, &c.

Some interesting particulars of gentes and familiae are collected here, as involving too much detail to be inserted in the text. They are of rather a miscellaneous character but may be classed roughly under two heads.

1. Apparent plebeian connexion, of a genuinely ancient character, with *sacra* or worship generally. The families referred to may, in some cases, have existed in a more dignified position elsewhere, and, when transferred to Rome, have been reduced to a quasi-ministerial character, being ultimately recognised as plebeian *gentes* (see Msr.³ iii. pp. 19, 74).

2. Alleged cases of similar connexion due to late family heraldry; with occasional pretensions of "arrived" plebeian families to early tenure of high office generally. The tendency of such families to decorate their real attainments of honour and distinction with fictitious stories of noble ancestry is not peculiar to Rome. The Fasti Capitolini, which were not finally settled till shortly before the beginning of our era, may no doubt have had fairly trustworthy contemporary records, upon which to draw, for the later Republican period. For the earlier, particularly before the burning of the city 390 B.C. they had to rely mainly upon more or less truthful family histories 117a. Now even the more extravagant of these must have been composed with some regard to traditional probability: so that I think we may take the evidence of the Fasti as shewing generally that, except in cases of gross and patent improbability, there were existing members of the gentes to which early consulships, &c. are attributed, capable of attaining office about the time when they are dated in that record. On the "additions" of such early officers not much reliance can be placed. Whether Mommsen is right or not in holding 118 that the original lists of Magistrates did not contain any cognomina until the later Republican times, there are undoubtedly fictitious ones in the existing Fasti, which often do not appear in such of our surviving historians as drew from earlier and better sources 119.

The Genucii for instance, who appear in the Fasti Consulares of 451 and 445 B.C. as Augurini, are an obvious anachronism. That cognomen could not exist, for this gens, before the passing of the lex Ogulnia in 300 B.C. 120 The same remark applies to the Minucii, whose early style of Augurini is as impossible as their early consulships of 497,

¹¹⁷⁸ See Sources, pp. 58-59, 73, 74.

¹¹⁸ Mommsen, Forsch. i. p. 48. See also above, § 4, p. 120.

us Sources, pp. 72, 73: also Mommsen, Forsch. i. pp. 66-68.

492, 491, &c. are improbable ¹²¹. Other facts, however, of interest belonging to one or the other of the heads mentioned above, will be classified under the *gentes* concerned.

To these I have added, in a second Appendix, the few cases in Roman tradition or usage which have been considered to point in the direction of Totemism, placed here as largely consisting of inference from names of gentes or familiae. It must, of course, be remembered that the following is in no sense a systematic account of Roman gentes or familiae, but only a collection of particular cases which appear to me to bear specially upon the origin or composition of either.

After the very brief notice of supposed Totemism in early Roman history or legend, I have placed, in two Appendices, (III), some points of comparison between the original gens and the earliest form of the Teutonic Gild, and (IV), a short account of the Anglo-Saxon or pre-Anglo-Saxon hundreds and tens, as bearing upon Dionysius' theory of a connexion between the gentes and the divisions of a Romulian Host.

Gens Antistia. There are not, that I am aware of, any sacra expressly connected with this stock. But the name is so distinctly indicative of religious employment that it can scarcely pass without notice. That name does not, I think, signify so much the office of priest or priestess, as of temple keeper¹²².

The gens Antistia was an old plebeian one, counting tribunates which date traditionally from the quasi-historical period before the Licinian Rogations, and reappearing, with

¹²¹ See however below, on the establishment of the Republic (§ 6, p. 232) as to a possible brief attempt at a revived duality, as representing the two Orders.

¹²² See Cicero, in Verrem, 2. 4. 45. 99: Gellius, 13. 21. 22, where it seems slightly opposed to *sacerdos*: cf. too Plautus, Rudens, 3. 2. 10, and generally this and the following scenes. Query is *doorkeeper* the meaning of the *dog* on their coins? See Babelon, i. p. 144: Cohen, p. 17.

more credibility, after ¹²³. Their badge, or crest, the dog, is to be seen among the first batch of coins which bore such symbols, though, as yet, no name. It is not therefore necessary to cite, as evidence of antiquity, the cognomen Vetus, which, moreover, may not have been the first borne by members of this gens ¹²⁴.

Nor should I trouble to mention Dionysius' strange story of Antistius Petro stoned125 by the machinations of Sex. Tarquinius, except for its somewhat inconsequent ending, in the noted treaty between Gabii and Rome¹²⁶. For this treaty, though we may pass over with a smile Dionysius' belief in the preservation of the actual document127, is clearly referred to on coins of the Antistii in connexion with the cognomina not only of Vetus but the more remarkable Reginus, and obvious representations of a Roman and Gabine Pontiff joining in the sacrifice of the pig128 normal on such occasions. Now there is no possible ground, that I can find, for considering Reginus local: I can only suggest that this name, as well as Regulus, points to some tradition of important religious office, of the nature of the rex retained in the Roman Republic, and once held, somewhere, by the Antistii; both the race itself and its religious character being transferred to Rome but placed on a lower footing (this however appears to apply more to Regulus than to Reginus). Is it possible that, in the earlier semi-mythical period, there

¹²³ An Antistius is tribune 422 B.C. (Livy, 4. 42), in 319 (id. 9. 16; 26. 33) and in 58 B.C. (Suetonius, Caesar, c. 23).

¹²⁴ Babelon, i. p. 143 (Livy, 45. 17). The earlier passage cited (Livy, 21. 63) does *not*, it must be observed, add Labeo to plain Antistius.

¹²⁵ There was possibly some *cognomen* of the Antistii upon which this part of the story was founded: but I do not know of any.

¹²⁸ Dionysius, 4. 57-59.

¹²⁷ He does not say that he has seen it: but there probably existed in reality some pious reproduction, like King Arthur's Round Table at Winchester.

¹²⁸ See Virgil, Aen. 8. 639-641: Livy, 1. 24, &c.

may have been some application of the practice noted above (pp. 141, 167) in rather a different form? That what appears, in historical times, as the delegation of an imported foreign worship to some Roman gens, or later sodalitas, may indicate, as between Rome and her early neighbours, the occasional admission of a priestly family, developed elsewhere, and incorporated, on somewhat inferior terms (possibly as temple servitors), into the Roman Polity, after the circle of patrician gentes was closed? See below, § 6, pp. 237, 247129.

Gens Atilia. The hypothesis suggested by the nomen and cognomen of the gens Antistia applies also, though in a less extent, to the Atilii. This also must be regarded, so far as we give any weight to the beliefs of those who compiled the Fasti, as a plebeian stock of ancient distinction.

A L. Atilius is one of the first military tribunes in 442 B.C.; wrongly, perhaps by a slip of Livy's, designated a patrician¹³⁰; a descendant of the same name, correctly stated to be plebeian¹³¹, holds the same office in 396: a third L. Atilius is tribune of the *plebs* in 311¹³². Fairly soon after the admission of the lower order to the highest magistracy (335 B.C.) we find a M. Atilius consul, bearing the *cognomen* Regulus¹³³ which is the reason of the *gens* being mentioned here. An Atilius Regulus is consul in 294¹³⁴ and another in 267^{134a}. The latter

¹²⁹ It must be remembered that the form of association into gentes was probably common to a large part of Italy (§ 1, p. 17), the special nucleus suggested above (pp. 168, 169) not being necessary or essential to such association. The immigration, or admission, of such bodies, might, in some cases, account better for their existence, as plebeian gentes, than the supposed developement of such gentes, or stirpes, at Rome itself.

¹³⁰ Livy, 4. 6, 7.

¹³¹ id. 5. 13. ¹³³ id. 8. 16.

¹³² id. 9. 30.

¹⁸⁴ id. 10. 32. I may say here at once that I do not believe this cognomen to have anything to do (as has been suggested) with the embassy of an Atilius to the kings or kinglets of Africa, 208 B.C. (Livy, 27. 4). I do not therefore count its use in 335, whether originally appearing in the Fasti or not, among the anachronisms mentioned above, on p. 174.

¹³⁴a See Willems, Le Sénat, i. p. 59.

appears to be the unfortunate general, whose fate is told in the Epitome to Livy's 18th book 135; he being re-elected in 256 and ultimately put to death by the Carthaginians, according to the Roman account, after his defeat in the following year. The fine lines of Horace are too well known to quote 136. Meantime, the Fasti give us an Atilius Calatinus in 258 and a Regulus in 257, the latter, however, bearing, according to Cassiodorus 137, the cognomen, not of Regulus, but Sarranus. But the old cognomen does not seem to have been dropped, as it reappears for some 40 years after the end of Horace's hero, in 227, 225, 217 and 214138, together with one or two Calatini and Bulbi (249, 247, 245, 236). After 214 B.C., I can only find Serrani (or rather Sarrani) to the end of the Republic, they being the only Atilii who appear bearing cognomina, on the coins of this gens, with the exception of one very doubtful Nomentanus 139. These would seem to be the only Atilii known to Virgil¹⁴⁰, who could scarcely have passed over the martyrdom so graphically depicted by Horace. Still, I think there can be no doubt that Regulus was the original cognomen used by the gens Atilia; and would suggest that some such hypothesis, as that suggested in the case of the Antistii, may be maintained here also. The strange story of Dionysius about the Atilius to whom, with another distinguished man, was entrusted the custody of the last Sibylline books is in point. His

¹³⁵ His history itself is lost from 272 to 218 B.C.

¹³⁶ Odd. 3. 5. 41-56.

¹³⁷ Who professes to take the earlier part of his list from Livy and Aufidius Bassus. See Clinton, F. H. iii. p. 14, and Teuffel (Hist. of R. Lit., tr. Warr), ii. p. 528.

¹³⁸ See, however, Livy, 22. 25 as to the Consulship of 217. As to the Consorship of 214, id. 24. 11.

¹³⁹ Babelon, i. pp. 231, 232.

¹⁴⁰ Aen. 6. 844, where he refers to the story and the popular derivation of Serranus (which on the coins is SAR.) with the usual moral of old rustic poverty and virtue. For the story see Cicero, pro Sex. Roscio, 18. 50: Val. Max. 4. 4. 5 and Pliny, H. N. 18. 5.

breach of trust and punishment by the doom of a parricide are possibly to be connected in some way with the appearance of an ancient sacerdotal family as plebeian 140a. The Livineii, who resumed the cognomen in the half-century before our era 141, are supposed by Babelon to be a branch of the Atilii. There are existent coins by moneyers of this late and obscure family, on which the name Regulus occurs repeatedly 142.

The Gens Aurelia has not the same historical or quasihistorical evidence of antiquity as the *Antistia*, but, on the other hand, is expressly connected with a specific worship—of the Sun. Festus, P. p. 23, referred to above, p. 141, runs thus: Aureliam familiam ex Sabinis oriundam a Sole dictam putant quod ei publice a populo Romano datus sit locus in quo sacra facerent Soli, qui ex hoc Auseli dicebantur, ut Valesii, Papisii pro eo quod est Valerii, Papirii.

The latter part of this note smacks, undoubtedly, of the original Festus, or even of Verrius Flaccus himself. Its correctness, however, may be questioned when we read in Varro of Sol as the Sabine name for the Sun¹⁴³, and also take into account the suggestion of Curtius that the name of Aureli (or Auseli) is probably connected with an Etruscan name Usil for the same God¹⁴⁴. The Aurelii gradus mentioned by Cicero in 70 B.C. as recently erected, do not appear to have been a sacrificial edifice but merely a permanent and substantial, as distinguished from a moveable, tribunal¹⁴⁵. They might, in later times, be mistaken for something of the

¹⁴⁰a See Dionysius, 4, 62,

¹⁴¹ See Cicero, ad fam. 13. 60; ad Att. 3. 17

¹⁴² Babelon, ii. pp. 141-147.

¹⁴³ Varro, L. L. 5. 68. Sol, quod ita Sabini.

¹⁴⁴ Curtius⁵, pp. 399, 400. Compare Dennis (1878), i. p. lvii. Mommsen, Msr.³ ii. p. 63, n. 2, speaks of this passage, in Festus, as relating to a Gottheit nichtlatinischen Namens und ein eingewandertes plebejisches Geschlecht.

¹⁴⁵ Cicero, pro Cluentio, 34. 93; in Pisonem, 5. 11.

former character. The gens Aurelia, I should add, though a distinguished plebeian family, is not one of reputed prominence in early times. Its first representative that I can find is the Consul of 252 B.C. 146

Were it not for the Auseli of Festus, I should be inclined to attribute the whole connexion with Sun-worship to facts in the life of the Emperor Aurelian (see his life by Vopiscus, cc. 4, 5). On the doubtful date of Festus see Sources, p. 90.

Gens Flaminia. In the remarkable case of the Flaminii it would seem as if a new gens had been formed, in comparatively historical times, out of the exceptional tenure of the office of Flamen, by some ancestor of the reformer C. Flaminius Nepos, whom Livy makes the scapegoat for the Roman defeat at the lake Thrasymenus¹⁴⁷. I base this suggestion upon the much-contested letters PRI. FL. on a denarius of L. Flaminius Chilo a moneyer of 44 B.C., of which letters I prefer to adopt the old extension, Primus Flamen, meaning either First to be Flamen or Chief Flamen¹⁴⁸. Now we are told, on the alleged authority of Cicero¹⁴⁹, that the Flaminate continued down to his time to be a monopoly of the higher Order. But I believe Cicero to be here speaking only of the three greater Flamens who undoubtedly did remain to his

¹⁴⁶ For the strange story (surely from some Greek source), of the family cognomen Cotta (κότος, cos) being first given to him ob iracundiam, see Val. Max. (ed. 1679), p. 112, n. 7. I do not know the author of the distich there quoted

Irasci faciles Cottae vultuque severos Fama refert: domui nomen et inde datum.

¹⁴⁷ Livy, 21, 63; 22, 3, 4,

¹⁴⁸ Cohen (p. 138) takes this abbreviation to mean premier flamine though he does not explain it as above: Eckhal's quatuorvir primus flandae monetue appears to me better than Mommsen's primus flavit, but I venture to think that the sense of neither is satisfactory (see Babelon, i. p. 496). The suggestion of "first to be Flamen" appeared originally in Essays in Legal History (Oxford, 1813), p. 150.

¹⁴⁹ De domo, 14. 37. Failing patricians, he says, populus Romanus brevi tempore neque regem sacrorum neque flamines nec Salios habebit, &c.

time patrician¹⁵⁰. Not to press the 15 of Festus (l.c.) and the various Flamens individually mentioned by Varro 151, some of whom, at least, it may be argued, were later than Cicero's time, we find Cicero himself152 speaking of the Flaminate to Carmentis (see § 2, n. 93) being held, 300 years before his time, by a Plebeian. I only, however, wish here to shew that the evidence of Cicero is not conclusive against the possibility suggested at the beginning of this article, the supposed plebeian tenure of some Flaminate being however obviously treated as something very unusual. In a later section I propose to treat of the Pontifical Board, which has a considerable bearing upon the present subject 153, and, at the same time, of the possibility of the extra unnamed appointment having been actually made between 297 and 217 B.C. 154 The regularly formed cognomen Flamininus is taken below under the gens Quinctia or Quinctilia.

Gens Julia. The fanciful explanation of the name of Caesar upon which Servius relies as connecting the Julian gens generally with the worship of Apollo is given above, n. 13. There is perhaps some support of this explanation in the curious praenomen Vopiscus 155 which seems to be confined, at least in the times with which we are concerned, to the gens Julia; and, in that gens, only occurs in the quasihistoric period before the Licinian Rogations. The same note, however, of Servius, also records the more picturesque

¹⁵⁰ See Festus, F. p. 151, Majores, and p. 154, Maximae: also Gaius, 1. 112.

¹⁵¹ L. L. 5. 84; 7. 45. See generally my notes to § 9, p. 310.

¹⁵² Brutus, 14. 56. The Popilius here mentioned, appearing in the Fasti as Consul, with a Manlius, in 359 B.C., and with a Fabius in 356, must therefore have been a Plebeian. See also Livy, 7. 23.

¹⁵³ See § 14, pp. 430, 437.

¹⁵⁴ See Msr.³ ii. p. 22, n. l. For the numismatic evidence on this point see my paper in Vinogradoff's Essays in Legal History, p. 150.

¹⁸⁵ See Pliny, H. N. 7. 9, where he speaks of primus Caesarum a caeso matris utero dictus (giving the same reason for the Caesones of the *gens Fabia*), and proceeds in § 10 to define Vopiscos.

story of the elephant (Punice Caesar) slain by the Dictator's grandfather¹⁵⁶.

The first Caesar that I can find is a Consul in 157 B.C. after the second Punic war, and shortly before the beginning of the third. There are Julii Iuli in the Fasti from very early days of the Republic: there is a Mento Consul in 431 B.C. (Livy, 4. 26) and a Libo in 267 (Eutropius, 2. 17). The two last, as well as Vopiscus, look like names of real persons: nor does the "addition" of the fabulous Iulus, to my mind, discredit the existence of real early Julii. The legendary descent of the gens from Venus was adopted into the family history as early as the latter part of the second century B.C. 157: at any time, after that, Iulus might be inserted as a cognomen in the Fasti. The prevalence of Julii, with or without this heraldic cognomen 158 is enough to prove that the appearance of a member of the gens was traditionally regarded as probable from near the beginning of the Republic (see above, p. 174, n. 118).

The explanation preferred by Servius, of the connexion of the gens Julia with Apollo, as has been intimated above (n. 13), only applies to the Caesares. And Ulpian, in speaking of the Julia familia (above, n. 1) may mean this (Caesarean) family only, which no doubt ended by overshadowing all the rest. Although the gens looks a very large one in numismatics, the coins are in reality mainly due to the great Dictator, his connexions or successors.

¹⁵⁶ Possible, as a matter of dates, for the third Punic war: but such a story seems rather to belong to the second. Babelon (ii. p. 10) retaining the alleged Punic meaning of the word, gives another explanation of the elephant on the well-known coin.

¹⁵⁷ See Babelon, ii. p. 3.

^{158 489} B.C. Iulus: 482 id.: 473 Vop. Iulius Iulus: 451 Iulus ἐκ τῶν φιλοδημοτικῶν (Dionysius, 8. 90): 447 id.: 438 Vop. F. Iulus: 435 Iulus: 431 Mento, Vop. F. Iulus: 424 Iulus, Vop. F. Iulus: 408 Iulus: 405 id.: 403 id.: 401 id.: 397 id.: 393 id.: 388 id.: 379 id.: 352 id.: 267 Libo.

Dionysius however attributes a ἰερά τις ἐξουσία to the descendants of Iulus as such¹⁵⁹, and the Vejovis Pater to whom an inscription by the gentiles Julii was discovered in 1845 is, by some, identified with Apollo¹⁶⁰.

Gens Marcia. This is not, like the Antistia, and perhaps Atilia, an ancient plebeian gens, which there is some reason to suppose adopted in Rome after bearing a higher position elsewhere. Plebeian however it undoubtedly is. The first Marcius that I can find, of a possibly historical character, is a tribune of the plebs 386 B.C. Another occurs in 311, and another in 196161. I think these cases are sufficient to disprove Babelon's assertion that the gens was of patrician origin¹⁶². This no doubt rests upon stories of descent from Numa or Ancus, and of the exploits of Coriolanus, &c., all of which I have no hesitation in dismissing, with Mommsen 163, as the inventions of a race really eminent in historical times, but hungering after noble ancestors. Its actual distinctions begin with a consulship obtained ten years after that office was thrown open to the lower order, followed by a dictatorship and censorship, together with repeated consulships, held by the same person¹⁶⁴. His son bears, in addition to, or substitution for, the family cognomen of Rutilus, that derived from his father's office, of Censorinus; and, after the passing of the lex Ogulnia, is created one of the new plebeian pontiffs, while another member of the same gens becomes one

¹⁸⁹ Dionysius, 1. 70. It is just possible that he only means the tribunicia potestas.

¹⁶⁰ Babelon, ii. p. 6, and i. p. 506. See Gellius, 5. 12. 11, and Paley's note to Ovid, Fasti, 3. 443.

¹⁶¹ Livy, 6. 1; 9. 30; 33. 25.

¹⁶² Babelon, ii. p. 181. So, too, Cohen, Desc. p. 201: Patin (p. 166) prefers the old fashioned explanation of patrician and plebeian families.

¹⁶³ Mommsen, Forsch. i. pp. 104, 105.

¹⁶⁴ C. Marcius Rutilus, consul 357 B.c.: dictator 356: censor 351, &c. Livy, 7. 16, 17, 22, &c.

of the augurs¹⁶⁵. I pass over other distinctions of the gens, to come to a statement of the death in 210 B.C. of M. Marcius rex sacrorum¹⁶⁶. This attribution of office is regarded by Mommsen as suspicious¹⁶⁷, and he points out that the plebeian tribune mentioned in Livy, 33. 25 is called Q. Marcius Ralla, not Rex¹⁶⁸. There is no doubt, however, that there are later Marcii Reges, among other cognomina of the gens¹⁶⁹.

It is only of this remarkable cognomen that I have to speak. It has been attributed to the alleged Royal descent of the Marcii¹⁷⁰: but in the opinion of Mommsen, with whom so far I agree, it could only be referred to some alleged previous tenure, by a Marcius, of the office of rex sacrorum (see n. 167). This fact is questioned by Mommsen, à propos of the individual case, on account of Cicero's statement that, down to his time, the office could only be held by a patrician¹⁷¹. I venture, however, to think that the somewhat exaggerated oratory of an advocate ought not to be held conclusive against the possibility of its exceptional attainment by a plebeian, as distinctly stated by Livy, writing of quite historical times (cf. the case of Flaminius above, pp. 180, 181).

Gens Pinaria. The Potitii, who die off so à propos (to account for their non-appearance in later times), perish as a penalty of being induced by Ap. Claudius to surrender their ancient trust (above, p. 140, n. 12). They were, according to Livy, coupled with the Pinarii, in the cult of Hercules,

¹⁶⁵ Livy, 9. 33: Fasti, 310 B.C.: Livy, 10. 9. 166 Livy, 27. 6.

¹⁶⁷ Mommsen, Forsch. i. p. 84, n. 25; also p. 104, n. 73.

¹⁶⁸ In the old edition of Drakenborch (1741), it is Rex: nor is this fact passed unnoticed (iv. p. 739, n. § 6). Madvig, Emm. Liv. pp. 489, 490, has no note on the subject.

¹⁶⁹ P. Marcius, 171 B.c., Livy, 43. 1: Q. Marcius, 118 B.c., id. 62. 1: also in 68 B.c., Cicero in Pisonem, 4. 8; C. I. L. i. p. 181.

¹⁷⁰ Plutarch, Numa, c. 21: Suetonius, Caesar, c. 6.

¹⁷¹ Cicero, de domo, 14. 38

but were, of the two gentes, specially instructed by Evander as antistites sacri¹⁷². The surviving gens (Pinaria) is clearly of ancient patrician stock¹⁷³. But of the Potitii there is no individual, historical or quasi-historical, for even the account of the death of every member of the gens, in one year, names no specific members¹⁷⁴. The difficulty is that it is the Pinarii, who are represented in the legend as holding the inferior position. I myself incline, with Mommsen 174a, to believe that the Potitii are a pure invention, as a counterpart to the Pinarii; the story of the latter coming too late to the feast, and so being sent empty away, arising from a play upon their name obvious to a Graeco-Roman legend monger¹⁷⁵. The real gens, historically connected with the worship of Hercules as custodes or ministri, subject to a special rite of fasting attendance 176, may have had, either generally or in some branch of their race, a superior charge which was transferred by the reformer Appius, the general opponent of patrician privilege, to a public officer, a mere ceremonial observance being left to the Pinarii.

¹⁷² Livy, 1. 7.

¹⁷³ Patin, p. 207: Cohen, p. 247: a Pinarius is recorded as Consul in 472 B.C. (Fasti: Livy, 2. 56): as plebeian military tribune in 432 (Fasti: Livy, 4. 25): as magister equitum, for a semi-religious ceremony of expiation, in 363 (Fasti: Livy, 7. 3): as Praetor in 349 (the first plebeian Praetor is in 337), Livy, 7. 26; 8. 15. Why Pais, Anc. Leg. p. 285, calls the Pinarii "well known falsifiers of Roman history" I do not know.

¹⁷⁴ Livy, 9. 29: Val. Max. 1. 1. 17.

Mommsen, Forsch. i. p. 104. 175 The Full and the Famished.

¹⁷⁶ See Plutarch's Roman Questions tr. by Philemon Holland (Jevons). c. 60. Carmenta (ib.) or Carmentis (Ovid, Fasti, 6. 59 and Dionysius, 1. 31) is, in the Graecised legend, Evander's mother, a prophetess: in Latin observance, an indigenous deity, whose priests participated in the fasting service of the Pinarii (Macrobius, 1. 5. 1; 3. 6. 12—15: Ovid, Fasti, 1. 462 and Paley's note). How "ladie Deianeira" came into Plutarch's head (l.c.), I can only conceive to be from some imagined etymological connexion of Nessus with the well-known cognomen Natta of the Pinarii. For what is probably the true meaning of this word see Festus, F. p. 166, Naccae... fullones. There are difficulties in this derivation (Corssen², i. p. 39), but Vaniček, i. 424, has no hesitation in accepting it.

I must admit that there is good deal of reading between the lines here: but the main features of the story, as to its historical part, seem consistent with the true political character of Ap. Claudius, the throwing open of the sacerdotia by the lex Ogulnia shortly after his famous censorship, and perhaps with a certain leaning of the Pinarii themselves (see Livy, Il.cc. in n. 173). A few other points are added in n. 176.

Gens Quinctia¹⁷⁷ and Quinctilia. As distinguished from the nomen Flaminia, the cognomen Flamininus is quite regular, the Quinctii being clearly an old patrician family, competent to attain the highest position of Flamen. representatives of this gens appear in Cicero's time as holding only comparatively subordinate positions and of no very high reputation 178. The relation, to it, of the gens Quinctilia is curious and interesting. The two appear as distinct both in historical and quasi-historical times. In the latter there are three Quinctilii: a Consul 453 B.C. anticipating the names of a historical Quinctilius Varus 13 B.C.; a military tribune 403; and a dictator appointed ad hoc (clavi figendi causa) 331, in a time of pestilence and secession 179. That all three bear the well known cognomen Varus (see 13 B.C.) is a mere anticipation common enough in the Fasti (above, p. 174). That record shows no more Quinctilii until the case last mentioned—one of Augustus' temporary or subsidiary consulships 180—but there are two or three contemporaries of Cicero, apparently of higher standing than the Quinctii, one of whom may possibly be the subject of Horace's beautiful Ode¹⁸¹.

¹⁷⁷ This is the old spelling: see Corssen², i. p. 36.

¹⁷⁸ See the Index to Nobbe's edition of Cicero: as to Trogus and Crispinus, Babelon, ii. pp. 393—397.

¹⁷⁹ Livy, 3. 32; 5. 4; 7. 18.

¹⁸⁰ See Msr.³ ii. pp. 1095—1098 Die Kaiserlichen Consulate.

¹⁸¹ See the Index cited above, n. 178. As to Horace, Odd. 1. 24, see Orelli's note on 1. 18.

It is difficult not to suppose the earlier Quinctilii fictitious, and the later a branch of the old Quinctian race, coming into prominence as that decays. At the same time I do not understand Velleius speaking of the Quinctilius Varus defeated by Arminius as a man of family illustris rather than nobilis 182, if there were any recognised connexion between these Quinctilii and the family of the Cincinnati and Flaminini.

II. TOTEMISM

I have suggested (above, p. 164) as a possible explanation of some gentile names that of an emblem badge or nickname. It is, I presume, on cases of this kind that a modern anthropological speculation, to my mind untenable, mainly rests. I mean an occasional tendency to identify the Roman gens, and similar bodies, with the oldest tribal, or sub-tribal, associations of savages in that stage of human development called Totemism, of which we have undoubted surviving instances, and which, it is suggested, was once normal or universal.

M'Lennan's view. According to this view the gens, which is identified with the Clan or rather Horde, precedes the monandrous Family which is derived from that earlier and ruder condition. I have given elsewhere (§ 2) my reasons for believing that this developement, if established as a fact at all, must have been already attained, in the Aryan stock, previous to its dispersion and migration. I believe in that migration taking place, at least in our direction, by Hosts, in some rude military order, divisions of which afterwards formed themselves into kins or gentes, but which consisted, from the outset, of Families framed on the paternal or patriarchal principle.

¹⁸² Velleius, 2. 117. 2. Illustris may possibly refer rather to imperial favour as outweighing even the highest republican distinction. The author is courtier enough. See the last four chapters of Book 2.

I may have occasion, elsewhere, to note some alleged traces of totemism in Aryan races generally: what I wish to point out here in particular is the very slight resemblance of the Roman gens, as an independent fact, to any Totemic association.

In the gens undoubtedly we have the common name, sometimes—I should scarcely say usually¹⁸³—taken from an animal or plant, the common worship, and the supposed bond of inherited relationship, which are among the characteristics of Totem kinship. But the first point seems to me fairly accountable for, in the cases of it which occur at Rome, by very simple considerations, which have in fact been suggested as explaining the origin of the Totem emblems themselves¹⁸⁴—distinctive product or occupation, emblem or nickname. Of the bodily mark, direct identification with the Totemic object, superstitious abstinence from the latter, or occasional eucharistic partaking of it, I find no clear trace in any Roman gens¹⁸⁵, the suggested instances being of savage external races.

Confarreatio. To take one striking instance; it certainly seems to me a very far cry from the savage's disgusting sheep or goat Totem to the decent religious symbolism of life union and domestic duty, which, after being more generally observed, was retained, in the old ceremony of *confarreatio*, for the Flamen and his wife¹⁸⁶. The names of animals, which, as well as those of other

¹⁸³ M'Lennan, P. T. pp. 206, 207.

¹⁸⁴ Lang, Secret of the Totem, p. 133.

¹⁸⁵ M'Lennan, P. T. pp. 227, 228: also see Lang's Magic and religion, pp. 264, 265.

¹⁸⁶ See Festus, P. In pelle lanata, p. 114: more in detail Servius, ad Aen. 4. 374, "in parte locavi." The nastier particulars in Jevons' Introduction to the translation, by Philemon Holland, of Plutarch's Romanae Quaestiones (pp. xevii, xeviii, and Quaest. 31, p. 50), which alone approach to Totemistic ideas of purification (!), are due to inferences from Greek ritual for an entirely different matter. See Suidae under Διὸς κώδιον.

articles of food or use, do undoubtedly appear in some of the Roman gentile names, are explicable, as I have ventured to suggest, on comparatively ordinary and homely grounds ¹⁸⁷, a remark which equally applies to *endogamy* (see above, p. 150). Exogamy will generally stand or fall with Marriage by Capture, of which the Roman proof is, to my mind, anything but sufficient: of the other Totemistic phaenomena, enumerated on p. 188, I can see, in the Roman *gens*, no clear instance.

Exogamy. With regard to the Exogamy, of which we hear so much, this theory may, no doubt, derive some support from the legendary history of the first Romulian tribe, among the other alleged traces, or traditional records, of Marriage by Capture. But the whole of that system, as a Roman institution, depends, as I have endeavoured to shew, upon very inadequate evidence 188.

I consider it waste of time to attempt to account, by humanistic, or quasi-euhemeristic, suggestions, for the scattered individual practices—mainly due to Plutarch's olla podrida of Romanae Quaestiones—which have been, in an easy-going fashion, dubbed as Totemistic by one or another modern specialist.

Frazer and M'Lennan. Indeed among the Aryan races generally I can see very little assigned to this particular originating principle which cannot be as well accounted for by very simple and intelligible causes. And I am the more confirmed in this opinion when I note the extremely cautious way in which Sir J. Frazer, in his great work on Totemism and Exogamy speaks of the existence, or otherwise, of the former institution among the races with which I am concerned. After briefly laying it down as certain for some

¹⁸⁷ See above, p. 164, and below, n. 192.

¹⁸⁸ See § 3, pp. 72, 73; § 6, pp. 234, 235.

periods of ancient Egyptian life and probable for Semitic, Greek and Latin races¹⁸⁹, he yet in a later passage¹⁹⁰ allows it to be not proved for Aryan, Semitic or Turanian Stocks, and pays very little attention to the two or three Greek or Roman practices which are often admitted to have considerable resemblance to Totemic rites¹⁹¹. Contrast with Frazer's caution the offhand way in which Pais speaks of names like those of the Porcii, Asinii, Suillii, &c. as to be explained directly by the conception that these races sprang from totem animals¹⁹², and the confusion, by the ancient priests of the Palatine, between the strongest and most vigorous animals among whom they lived, and their own actual ancestry, as objects of Totem worship¹⁹³.

Of one remarkable case, however, referred to in the passage last quoted, I have more particularly to speak, as it really appears to bear out, to some extent, Professor Pais' views.

The Hirpini Sorani of Mount Soracte have been repeatedly cited as exhibiting clear characteristics of Totemism. The strange story preserved by Servius¹⁹⁴ of the

¹⁸⁹ Frazer, Totemism and Exogamy, i. p. 86. For further particulars see Robertson Smith, Religion of the Semites, pp. 295, 304. The three points required by him as proof of early Totemism in "Kinship and Marriage," p. 188, are certainly not at all clearly established in Roman antiquities.

¹⁹⁰ Frazer, ib. iv. pp. 12, 13.

¹⁹¹ The October equus (Festus, F. pp. 178, 181) and the sacrifice (?) of the Lupercalia are suggested by Robertson Smith (Religion of the Semites, pp. 275, 459), but they do not appear to me enough to satisfy his canon mentioned above in n. 189.

¹⁹³ Anc. Leg. p. 88. It is, under this point of view, curious that the gentes, in which the names of animals come into the nomen, are not only, as they themselves indicate, plebeian (e.g. Porcia, Asinia, Suillia), but of comparatively late appearance in the history of Rome, belonging to a period, when we should scarcely expect totemistic ideas to have any prevalence.

¹⁹³ ib. Compare the stories of Acca and Faunus, p. 84, with the allusion to the ferocity of the Luperci, p. 144.

¹⁹⁴ Servius, ad Aen. 11. 785.

wolves tracked to their fetid den 194a, and the people thenceforth mimicking wolves, being called by the Sabine word for Wolf (Hirpi) and living like wolves, "id est rapto," may be confirmed, in part, by a historical survival of some immunity allowed, in Pliny's time, to a few families, of that name, from any public service195. There is, however, nothing very specially totemistic in the mountebank tricks, or magic, of these chartered Fakirs, and of course the usual explanation is to hand, of a leader being a wolf, or called Wolf (see Festus, l.c.). Still it is not improbable that we may have here some stray remnant of a pre-Aryan race retaining its savage rites in a few mountain strongholds or pestilential retreats, and allowed to remain, from superstitious motives, by the later conquering race. The same may be the explanation of the Bear rites in Arcadia and at Brauron in Attica (above, § 2, p. 28): a maritime refuge, in the latter case, taking the place of the mountain stronghold of the Hirpini 195a. I may mention the strange stories of dwarfish malevolent creatures in the wild corners of Scotland, as possibly being, like the early heroic encounters with dragons or "worms," not entirely fictitious.

III. THE GENS AND THE EARLIEST TEUTONIC GILD

The Gild a stage between Family and Township or Parish. The Gild system of the Anglo-Saxons has, as we have seen, been regarded as a sort of half-way-house between the Family and the Township or Borough¹⁹⁶. If a parallel

^{194a} There is possibly some confusion with the Hirpini of the lake Ampsanctus in the south of Samnium. Pliny, H. N. 2. 93, 208: cf. Strabo, 5. 250. See also Festus, P. 106 *Irpini*, who makes *irpus* a Samnite word.

¹⁹⁵ See Pliny, H. N. 7. 2. 2, and Servius on Aen. 11. 787, 788. See n. 140. ^{195a} As does, in the case of the Samnite Hirpini, a lake of sulphurous exhalations. Is it by any chance allowable to compare the Ozolian Locri who were, if Hellenic, among the most backward races of that strain, and from whom came the colony of the Epizephyrians remarked on above, § 2, p. 35? See Grote, Hist. (ed. 1888), ii. p. 216.

¹⁹⁶ See generally Stubbs, C. H. ch. 11.

to the elements of Roman Polity is to be made out, and the view here taken, as to the primary function of the curia (§ 9, p. 308), be accepted, it should rather have taken that place, as between the Family and the Parish. But, in fact, the time for which we have an approximation to trustworthy record for the Gild, is, in point of political developement, considerably later than that, for which we are trying to infer the early Roman condition of the gens and curia. It is a time when general Sovereignty has already been fairly established, and both gild and parish have been put to uses somewhat different from the original ones of gens and curia.

Kemble, Schmid, &c., on the original Gild. Kemble 197 considers gild to express originally either share in payment or share in worship. The former meaning is generally admitted: the latter is, as it seems to me, rather too summarily dismissed by Kemble. He is right, of course, in rejecting any parallel in the dedication, to particular Saints, of the later Trade Gilds 198. But whether we may not suppose, in remote Teutonic antiquity, some religious bond of gild, similar to that which cemented the $\phi \rho a \tau \rho i a$ and curia, is, in my mind, open to question 199.

The Teutonic gild was, undoubtedly, modelled on the

¹⁹⁷ Kemble, Saxons in England, i. pp. 239, 240. Schmid, Gesetze, holds that gegylda may mean a sharer in sacrifice or worship, but that this is a secondary meaning, that of payment or compensation being the first. See the end of his article s.v. Gegylda, p. 589. Grein, A. S. Wörterb. s.vv. Gild and Gildan, is to the same effect. In our Anglo-Saxon laws, share in payment of wergild is certainly prominent: but there is also a vague use, in which the word scarcely means more than associate. Liebermann as usual classifies but does not generalise. See however, in his article of the Wörterbuch, Genossenschaft, Nos. 7 a, b, c for the earlier uses of the Gild.

¹⁹⁸ Kemble, ib. p. 240, because no trace of any such hero-worship (as he admits in the $\phi\nu\lambda\alpha t$ and gentes) remains in our heathen mythology. He distinguishes (in note 1) the dedication of the trade gilds to particular saints.

¹⁹⁹ See the suggestion of Miss Phillpotts quoted in App. to §4, p. 134: Kluge, s.v. Gilde, and the elaborate argument of Brentano as against Wilda, English Gilds (Toulmin Smith), lxxii—lxxiv.

Family as its archetype—on the Family, too, in its widest sense, as determined by the rights and obligations of wergild—including therefore cognati²⁰⁰. It was a supplementary institution, whether arising from a general desire of greater security (which is rather Brentano's view of the old Teutonic association), or from a particular deficiency in family relationships. A recognition of the latter grounds for union may be discerned in a law of Alfred²⁰¹, which has, I think, been already quoted by me. In the very early laws of Ina we read of even a thief, slain in the act, having gegyldan²⁰².

As to the unifying religious tendency which was apparently present in the Roman curia, see § 9, pp. 308 sqq.

The religious tie of the original gild is, according to Brentano, clearly commemorated or cemented by festivities, which continued to be observed, like the Fornacalia, with more or less license, in quite late times. Their earlier history is thus summed up by the authority from whom I have mainly been quoting: "After the German tribes had settled in fixed abodes, the families dwelling in a certain district united themselves into common sacrificial assemblies. As a rule, common meals were connected with them, to which every one had to bring what he wanted of food and drink. From this, the unions were called Gilds (see n. 197). When Christianity, together with its religious fraternities, came to the North, the latter amalgamated with the sacrificial societies which they found there, and from this union arose the religious gilds of the Middle Ages²⁰³."

²⁶⁰ See § 4, App. p. 131 and passim. But hereditary transmission of membership does not appear to exist at first. That stage of development belongs rather to the time of Trade or Merchant Gilds. When it is reached, we are obviously on the way to the establishment of a patriciate, and might be beginning the long struggle between the Orders at Rome.

²⁰¹ Alfred, 27. ²⁰² Ina, 16

²⁰³ Brentano, Pref. to Miss Toulmin Smith's English Gilds, p. lxxxi; see too pp. lxxxvi—lxxxix. Gross (App. p. 169) is in a sort of negative agreement with Brentano so far that, although he does not consider the

Frith Gilds. The parallel with the curia ceases at the above point. It is, as has been said, in a later aspect or stage of development that we find the gild recognised and utilised by the Saxon Kings. It was the interest of these early Polities, or at least of their heads, with a weak executive and a general popular proclivity to private war, that each man should be in borh, or surety, i.e. should belong to some fellowship or association, which shall take his part in dispute and, on the other hand, be held liable for him. For the most detailed authority on this subject, which is late, see below (p. 199). Some earlier occurrences of the principle are given here.

In the infancy of Anglo-Saxon law, represented by such names as Aethelbirht, Hlothar, and Wihtraed, if a homicide absconds, it is only his maegas (kin) who are to pay half of the wergild²⁰⁴. In the slightly later time of Ina, when the idea of avowed ordinance or legislation is beginning to take the place of a simple schedule of judgements, but law still, as so often in the Roman Twelve Tables, merely enshrines and perpetuates prior custom, the gegyldan, whose claim, for a slain outsider, is in dispute, are evidently still in one case the maegas²⁰⁵.

But in Alfred's laws, while the distinction of father's and mother's relations (faedren maegas and mêdren maegas) is marked, both are clearly distinguished from the gegyldan²⁰⁶. The subject of wergild is treated independently elsewhere (§ 4, App.) where an endeavour is made to shew, by early gilds to be a development of the kin or family, he does clearly distinguish them from the later gilds merchant. The reference, in Brentano, of the meaning of the word gild to the common meal &c. is perhaps due to some vague connexion with the Welsh gwyl a festival and Breton goel, which have nothing to do with A. S. gild.

²⁰⁴ Aethelbirht, 23; see Kemble, i. ch. 9.

See the style of Ina's laws (&setnysse), and his prologue. The particular enactment referred to is in 20, 21.
 See however Ina, 54 and below, App. IV.
 p. 201.

reference to Miss Phillpotts' research into that subject, that the rights and liabilities in question can not be considered as based on agnatio, in the strict Roman sense. It will appear from the two or three cases of that subject just cited, that although the gegyldan, for these particular purposes, seem to have been represented, under the very early Saxon Kings, by what would have been, in Roman law, cognati, perhaps even gentiles, any such real or assumed relationship soon ceases to be regarded or considered: so that Sybel's statement referred to in a previous section (§4, p. 116) must be taken subject to the qualification laid down by a later and very accurate authority, who proves, or purports to prove, the earliest gilds not to be any actual developement of the true kin or family²⁰⁷. If the gild system is to be regarded in the light of a step between the Family and the Township, it is, as will be seen in the following Appendix, rather in the later or secondary stage of Frithgild, and its utilisation under the form of Frankpledge, than in its remoter origin as a religious semi-family association, which has been hitherto compared with the Roman curia. With the still later developement of the Trade and Craft gilds, and the special formation of a patrician order (see above, n. 200), in the Belgian and German towns, we have here nothing to do.

IV. THE ANGLO-SAXON HUNDREDS AND TENS

A secular division. In the history, however slight and obscure, of the first Teutonic gilds, we have seen that there is undoubted evidence of that religious character which appears to constitute a recognised connecting link of the Roman gens, and which continues in some degree through the later developements of the gild. But it is in secular northern institutions that we can trace the most remarkable parallel between early England and Rome. A good deal has

207 Gross, cited above, n. 203.

been said, in previous sections, about the possibility of certain results in political arrangement arising out of an early marshalling of invaders by tens and hundreds. sistence of the larger unit in the names of our own local divisions is, of course, familiar to north country men, and its remoter origin, as a number of warriors, before its adoption as a land division by Edgar, is now very generally admitted: but the smaller divisions, or associations of ten, which are quite as remarkable and apparently as early, have not attracted so much attention to their presumeable origin, because they seem to make a fresh start, as a matter of administration, by a comparatively modern and independent developement, under an established Royalty. I must first devote a short space to a question briefly alluded to above, i.e. the hundred of the Anglo-Saxons considered as an inheritance from their continental ancestors. The usual identification with certain German institutions mentioned by Tacitus is obvious²⁰⁸. The hundred warriors from each pagus, and the hundred assessors of the principes who administer justice through the pagi and vici are readily taken to correspond to the Anglo-Saxon hundred with its court of freemen, and the vicus of the Roman historian to the Anglo-Saxon tunscipe, as the latter is actually rendered in the Latin version of Bede²⁰⁹. Whether these undoubted prima facie resemblances quite justify the generalisation given below (p. 203) is no doubt open to question. Yet we may surely agree so far with Kemble that some kind of military organisation undoubtedly preceded the peaceful settlement (in England)

²⁰⁸ Tacitus, Germania, 6, 12. Cf. Stubbs, C. H.⁶ i. p. 35, n. 1 and generally, pp. 70, 71.

²⁰⁹ Tacitus (c. 12) apparently regards the vicus as a subdivision of the pagus. Bede's villicus, who is identified with the tungerefa in H. E. 5. 10, is under one of the satrapae of the Old Saxons, one of whom, in war, is elected to take chief command of the gens. They are not yet kings but temporary military leaders. Hist. Ecol. 5. 10. Cf. however Nithard's pro suo vero libitu, Stubbs, i. p. 45, n. 2.

and in many respects determined its mode and character²¹⁰. In spite of minor racial differences, we may also take into some account the Lex Salica, which is to be regarded as a summary of Frank law or custom in the fifth century²¹¹, and which distinctly recognises a centenarius as the presiding officer of a judicial assembly, whether identical with the thunginus or not, it does not clearly appear²¹². The judicial assembly is the mallus, which, under a Kentish form, appears to be identified, in a very early Anglo-Saxon law, with the hundredgemot of later times, another court being mentioned in the same law, which Thorpe considers to be that of the tithing²¹³.

That the hundred already appears, as a territorial division, in the laws of Clothair, at the close of the sixth century, is interesting, as distinctly preceding the similar recognition of it by Edgar, but I am not at present concerned with that question, the difficulties of which, in the varying extent of the hundred, wapentake, &c.²¹⁴ are certainly best accounted for as vestiges of the actual settlement, by the hundred warriors, in different invasions²¹⁵.

²¹⁰ Kemble, i. p. 125.

²¹¹ Stubbs, C. H. i. p. 55. The recension seems, by the note added to the prologue, to be dated 793 a.D. The last words of the prologue itself may contain an interesting reference to the foundation of the chapel at Aachen about that time. See Hessels and Kern, Lex Salica, col. 422.

²¹³ Stubbs, ib. p. 59 seems to make them identical. But see Kern's note on xlvi. Lex Salica (H. & K. col. 535). The *thunginus*, l.c. is according to Kern the "coactor and exactor." He has here clearly in mind the old explanation of gerefa (§ 12, App. pp. 409 sqq.).

is Thorpe, i. p. 31 on Hloth. and Ed. 8, an medle (or medle) odde an pinge. The latter he takes to be the Court of the tithing (see below, p. 202). Mallus is the Gothic mathl a market place (Ulfilas, Mark 7. 4). Cf. the Greek dyopá in all its senses.

²¹⁴ Stubbs, ib. § 45. The word WAPENTAKE, whether it means contactus or capio armorum (see Schmid, s.v. pp. 508, 672) is strongly in favour of the warrior origin of the hundred. Riding, lathe and rape (see Blackstone, i. p. 116) have no intrinsic significance beyond subdivision or aggregation and possibly measurement.

²¹⁵ This is the view of Maurer and Kemble. (Stubbs, i. p. 105, n. 2).

So far the particulars above quoted are, to my mind, sufficient to render most probable an original Teutonic military arrangement of a hundred men, conceived also as acting as a Court under the presidence of their chief: but they afford slight, if any, countenance to the idea of a subdivision, also forming a subordinate Court, or Civil unit. These smaller divisions of the Host I only venture to infer, from an evidently pervading practice of the Anglo-Saxon kings at a later and fairly historical time. This seems to me to indicate, if not exactly a preexisting nucleus, at any rate some sort of model or pattern descending from those early invasions, of which we have only such very doubtful and what we might almost call mythological accounts216. Reference has been made above to the real or assumed brotherhood of the subdivisions in Agamemnon's army; and we may assume something of the same kind as subsisting in the following semi-Hellenic period.

Later gegyldan. The actual or presumed relationship of the small bands, by which the actual Saxon occupation of England was ultimately effected, is a much disputed matter. I do not, as has been said on several occasions, lay any great stress upon the termination-ing, which occurs in so many placenames, but may be accounted for in half a dozen various ways without any introduction of that idea. There seems, however, nothing unreasonable in the supposition that, under the general requisition of a borh or surety for each individual (above, p. 194), there might be, in any attempt at peaceable government, a tendency to treat the inhabitants of each settlement as primâ facie kinsmen (see above, pp. 194, 195) and to regard the older gilds as framed on the pattern of the family, and treat them accordingly, though they were not directly an expansion of it. Even before the system of the

 $^{^{216}}$ Not unlike those of Greek occupation between the times described in the Homeric poems and that of the Hellas which we know in the Persian and Peloponnesian wars.

Frithgild was fully established we can perceive the gradual substitution of membership of a gild for the natural bond of family, a substitution which would be accelerated by the incoming of kinless men and strangers in a State not yet sufficing alone to satisfy its members' claim for legal protection. In one reading, at least, of the law of Alfred cited above, a recognition of this ground of union is to be seen. And the gegyldan, here spoken of, no longer belong to a union solely or mainly religious. They are members of a more secular association, modelled perhaps on the Family, but meant to supply a mutual help and protection for which the Family no longer suffices.

Now the various classes of artificial union, of which I am speaking, though they agree broadly in their model, spring otherwise from slightly different causes, and have different objects. Those, to which I now pass, and in which I am endeavouring to trace a revival of the old military decimal system, are distinctly the result of a weak Sovereignty.

Frankpledge. The system generally known by this name is one which only dates, to our knowledge, from a time when permanent Royalties, as distinguished from temporary Chieftaincies, have been established in England. The principal account, that we have of it, is decidedly late (Edw. Conf. 20, Schmid², p. 502). But it is evidently a very ancient Anglo-Saxon institution, though connected already, as Maitland points out, with the growth of seigniorial justice, by which, in the end, it was displaced.

But the principal point, for which I quote this authority, is his admission, for pre-seigniorial conditions, that the "chief pledge" seems always to have exercised a certain authority over his subordinate "pledges": the yldesta over his nine companions (see Aethelstan, 6. 3 cited below), the tithing man over the tithing, the borsholder^{216a} over the borh, the reeve over the vill, though Maitland denies them, except in legal

legend, any true judicial powers²¹⁷. May we not possibly recognise in this degree of headship some memory of an original minor captaincy such as Dionysius (2. 7) describes in the $\delta \epsilon \kappa \acute{a} \delta \epsilon \varsigma$ of his fabulous hero Romulus: which did not reappear in the gens of the strong Roman supreme government, but was adopted, in various forms, by the weakness or policy of the early sovereigns of the Heptarchy?

The names of the different headmen referred to in Anglo-Saxon law, with one exception²¹⁸, will be considered, together with that of *tribunus*, in treating of Approximations to Sovereignty (§ 12). At present I have only to deal with the divisions of *ten* themselves.

Aethelstan, 6. 3. The passage of Aethelstan's laws, to which I have above briefly referred, is one of extreme difficulty, and I can only suggest its general result with great diffidence and hesitation. The people (of a general frithgild of London) are to be told off into tens, in which the oldest man is to admonish the other nine of the statutory obligation imposed upon them. Then these tens are to be reckoned together, and a tens-man with them, who is to inform the (under) ten of what is necessary for the common weal, and these eleven are to keep the money of their tens, and make note of what they pay out or receive &c., &c.²¹⁹ The ultimate purpose is not, at present, in point; nor shall I attempt to

 $^{^{217}}$ P. & M. i. p. 558. The reference is to Edw. Conf. 28 which is scarcely to be dignified with the name of statutory law. On the subject generally see Stubbs⁶, i. pp. 93 sqq.

²¹⁸ The *gerefa*, which name has a more specific signification and will therefore be considered at the end of this section as well as in those on the development of Sovereignty.

²¹⁹ Aethelstan, l.c. Schmid, 2 p. 160.

Liebermann, Gesetze, i. p. 176, translates the words which I have italicised respectively die Hundertverbände and einen Hundert-obern. So, too, Kemble (i. p. 242, n. 2) identifies the hynden with the hundred. The "artificial hyndens or tithings of gegildas" (Seebohm, T. C. p. 415) are, I think, clearly tens. I cannot find any opinion expressed as to the meaning of hynden either in Pollock and Maitland's History of English Law or in "Domesday and Beyond."

explain how the eleven, distinctly mentioned here, come to be twelve in a later passage²²⁰. I only maintain that this one proves the existence of an idea, already familiar, of a hundred, composed of sets of ten, men who are here treated by Aethelstan, or his London council, as forming a civil unit. "I do not for a moment imagine," to use the words of Kemble, "that this was an entirely new organisation"; but that it was an old one used for a new purpose²²¹. The hynden, indeed, occurs in the earlier laws of Ina (before 694). The passage in that law is even more difficult than in this of Aethelstan. So much only is clear, that the bodies mentioned in it as hyndens are associations responsible for, or entitled to, wergild, on account of homicide²²².

It will be observed that I have, in the quotation from Aethelstan, translated hynden by ten, which the sense of that passage seems to me to require, and which was the view taken by Kemble's predecessor Price. This was not however the view taken by Kemble himself nor is it now that of Liebermann or Schmid²²³. In the well-known Constitution of Edgar on the hundreds, it is obvious that the hundredesman of 1. 2 corresponds to the hynden-man of Aethelstan, and the tithingman of Edgar to the yldesta of Aethelstan's ten men. Kemble, I must add, while quoting, in order to differ from it, a note

²²⁰ Aethelstan, 6. 8, § 1. See Kemble's note, i. p. 242, n. 2.

²⁸ Like the *tithing* and *tenmantale*. Kemble, ib. p. 241, n. 2. The former (*teothing*), literally a *tenth* part, is apparently identified with the *hynden* if we compare the two passages of Aethelstan. In the view taken here, of an original division of the Host, the difficulties of Stubbs (C. H.* i. 5, p. 93) seem to disappear.

²²² Ina, 54. The fact of their being mentioned in the plural (§ 1) is rather in favour of the hyndens being tens than hundreds.

²²³ Or of my old friend and constant referee in all matters of Anglo-Saxon laws, Professor Skeat. My own view, that hynden is a diminutive from hund was thus corrected by him. "Hynden is an adjectival form from hund, not a diminutive: it means therefore something of or belonging to hundred—a tenth or any other part." "Hund alone means a hundred: the suffix merely adds the idea, by tale or reckoning." Skeat, E. E. 2i. p. 220.

of Price to the effect of the hynden consisting of ten men, accepts, as indisputable, this meaning for Turba or Tourbe in the French customary Law (turba decem dicuntur) and suggests the identity of that word with the English thorp (vicus). If this be true, we may possibly have a very remarkable and interesting parallel between the foundation, at Rome, of the local gens and, in England, of what Kemble calls the tithing or gyldscipe, out of the smaller divisions of the invading Host²²⁴.

Turba, thorp, vicus. The terminations -ton, -ham, -by, and -thorp, one of which is here referred to, indicate colonisation by different branches of a race which, in its fundamental and national character is practically the same. From the scattered position of places bearing these names, and, as a general rule, their small size, we should infer that their respective settlers were, for the most part, few in number; so that there is no difficulty in accepting, as nucleus, a division of ten, or even of five, the number generally made up by the reeve and his companions delegated to represent the township at the hundred court in the view of frankpledge²²⁵.

Pearson. I may now perhaps venture to quote the generalisation above referred to (p. 196) which, in spite of the suspicion with which all generalisations are regarded by most investigators into ancient history, and a particular note of caution (below, p. 203) by one of our highest constitutional authorities, may possibly express with some truth a law of

²²⁴ Kemble, i. p. 243, n. 3. I give this suggestion, however, for what it is worth. I cannot make out Kemble's authority for the words turba, &c. But the passage of Loisel is correctly quoted, and the ten witnesses are possibly indicative of the original constitution of a turba or tourbe. Moreover a thorp is, no doubt, often a township; an instance of which I can cite in my own old home Ellinthorp near Boroughbridge, which has, in fact, been a subject of recent litigation, as a sort of customary peculiar, in a matter of county rating. But when Laveleye (p. 12) finds the same root in the Russian village derevnia, the German dorf, the Anglo-Saxon thorpe and the French troupe or troupeau, he reminds me rather of Voltaire's definition of etymology. See, however, Curtius, p. 227, § 250.

225 P. and M. i. p. 557.

association prevailing, under different names, throughout Saxon England. "To appreciate the Anglo-Saxon settlement," says Pearson²²⁸, "we must bear in mind that the conquering people were, in every case, a little army, composed of a number of companies, united by blood, by language and by a common name. Each company, in its turn, was formed, in part at least, of men who bore the name of their chief, his gesith or foster-brothers, if not actually his kin.... But, as the family bond was artificial, it was supplemented by a numerical principle of division. Ten families constituted a tithing, the self-governing unit of the State, which is now represented among us by the parish, and ten tithings were a hundred, whose court administered justice amongst the little communities themselves. As the people settled down, the tithing and the hundred naturally came to stand for division of land, not for any specific number of families," &c. &c.

Probable origin of the Reeve. That there may be here rather too much anticipation of a later and more settled society, for the rough invading age, I admit: but that some model of the subsequent structure may be pretty confidently inferred in the Teutonic Hosts of invaders, something, too, resembling the traditional order attributed to the Roman Hengist, I shall continue to maintain. The particular caution, of Stubbs, above referred to, rather applies to a matter of detail than to the general principle for which I am contending. But it is a matter of detail germane to that principle, because it bears upon the particular position of command here assumed for the officer who, in my view, ultimately became the Reeve. Stubbs' rejection 227 of the "inviting analogy" of shire-man, hundred-man, and tithingman to sheriff, hundred-reeve and town-reeve, is based mainly upon the functions of the least important officer as

Pearson, History of England during the Early Middle Ages, i. p. 250.
 Stubbs, C. H.⁶ i. p. 102, n. 7.

the "mere servant or executor of the law." I believe, on the other hand, that we are justified, both on historical and philological grounds, in attributing to the gerefa of older date a position not so simply ministerial (see § 12, App. p. 409). The continuing existence of a headman in the smaller divisions of the presumed original Host, is not, indeed, material to my theory of religious consolidation at Rome, nor is it borne out by any clearly proveable historical conditions of the gens and curia 228 But the character of the functions of an office, which is evidently of great antiquity, and which bears a name that has never been yet satisfactorily explained in reference to our oldest materials of Anglo-Saxon law or etymology, may have some interest in comparison with other styles of office which have been put together in view of explaining the developement of ultimate or true Sovereignty. I have therefore placed a philological enquiry into what were possibly the original functions of the gerefa at the end of the section dealing with that subject and confine myself at present to a consideration of the original township.

The Anglo-Saxon tunscipe. A theory which has hitherto been rather suggested than directly expressed, except in
the passage from Pearson, is that the tunscipe of Anglo-Saxon
England was founded by one of the smaller divisions of our
invading Host. As to the word itself, the termination gives
us, in point of derivation no help: in use, the compounded
word rather indicates the whole thing as a legal unit, the
simple tun the enclosed space²²⁹. Nor can much more be
made out of the similar terminations -wic, -ham and -by²³⁰.

²²⁸ Above, § 5, p. 156; below, § 9, p. 309.

²²⁹ P. and M. i. p. 550: Stubbs, i. p. 88, n. 5. The tun was originally the fence or hedge. Grein has in one or two passages the illuminating compound wie-tun.

²⁵⁰ Except as to the particular provenance of the invaders. The words themselves merely indicate, like $\kappa \omega \mu \eta$, pages and $\delta \hat{\eta} \mu \sigma s$ very general and ordinary ideas, unlike $\kappa \lambda \hat{\eta} \rho \sigma s$ which has a specific and important signification (§ 5°s, p. 221).

But their frequent combination, in names of places, with the proper name of a man, is in strong support of the theory stated above; the apparently patronymic -ings indicating often, as we have seen in other similar cases, persons not necessarily descendants or even relations²³¹.

Special worship. The occasional indications of special worship (see § 5, p. 139) among these English place names, are not, in my own personal experience, very numerous. They appear to belong rather to the North than the South, and especially to districts distinctly coming under the influence of the Danes, whose persistent paganism is well known ²³². But Kemble in his 12th chapter of Book I (Heathendom) makes out such names to be much more general. The posthumous work of Mr Shore has a very copious index of English place names the results of which rather agree with my own view. But it must be remembered that the preference of this interesting writer is always, if possible, to identify the specific element in the -ton, -by &c. with the name of some subtribe, derived usually from its supposed original place of residence.

On the subject of a particular cult having long ceased to be a bond of union among the groups of northern invaders in our own country, see the acute remarks of Miss Phillpotts cited elsewhere ^{232a}. This is a point of considerable difference from the Roman units of early association, in which what we have reason to believe the ground of their original union, viz. religion, subsists in their later political use but subsists for little more than that purpose alone. In our case, on the

²³¹ § 5, p. 160.

²³³ Baldersby and Thorsby are English instances within my knowledge. In the curious word *godord* cited by Stubbs⁶ (i. p. 61, n. 1) from the old Icelandic constitution, there does not appear so much a union primarily under religious motives as a combination of secular and religious organisation together, such as is often the view taken of the early constitution of Rome.

²³²a Appendix to § 4, p. 134.

other hand, any specific difference of cult, such as certainly characterised the *sacra* of the Roman *gens* or *curia*, had been obliterated, so far as we can judge from the legal records which have come down to us, in their uniform dismissal or condemnation as *idolatry*²³³.

Folc and populus. For a comparison of the Anglo-Saxon Kingdom with the union of the three Roman tribes into a populus, as a local or national question, distinguished from that of the consolidation of different powers into a true Sovereignty, see the last pages of § 5 and the first of §§ 10 and 11.

Relation of the ten to the hundred. The particular relation of the tens to the hundred-whether they are to be considered as anterior components or divisions of the larger number, is not a matter of very much importance for our present enquiry. I am myself inclined to take the former as the more probable view, and the more in accordance with the remarkable passage which has been cited from Aethelstan, as bearing particularly upon the probability of an early existence of the minor army division serving at least for model to the civil institutions that followed. In the earlier part of the tenth century²³⁴ the city of London was apparently formed into a large frithgild, from the regulations of which we not only gather much information upon the internal associations or divisions described, but may conclude from the familiar and unexplained manner in which they are introduced, as occurs in so much of the Twelve Tables, that the ideas or originals had been known long before²³⁵.

²³³ See the enactments against "heathen-ship" such as Cnut, 11. 5, Schmid*, p. 272. Comparing this with the Poenitentiale of Theodore, 1. 17 (Wasserschleben), we see that any specific worship of the old faith is, in the times with which we have to do, relegated to the general head of idolatry and witchcraft.

²³⁴ Aethelstan's reign is from 925 to 940 A.D.

²³⁵ Above, p. 194. Hynden, in fact, occurs as we have seen previously in Ina's law 54.

5a. COMMON OR PRIVATE OWNERSHIP IN GENTILE LAND

MOVEABLES and immoveables, p. 207. Patrimonium, ib. General modern view, 210. Private ownership in moveables prehistoric, 211. ¹ Confined to moveables originally, ib. Mancipium, ib. Dominus, erus, 212. Familia, pecunia, ib. Hortus, heredium, 213 Centuria, centuriatus ager, 214. Bina jugera, 215. Enough for one family, 216. Alleged Romulian division, 217. Distinction of original settlement from later ager publicus, 218. Alienability of heredium, inter vivos, ib. Testamentary, 219. Sors, 220. Sortire, &c. 221. Conclusion, 222. Appendix on names of owner and property, 223.

Common ownership of land. The question of gentile or individual ownership of land arises to some extent out of enquiry into the probable origin of the *gens* itself (see § 5, pp. 146, 170). But it is a subject too wide to be treated merely as an accessory and too interesting to be left out entirely, although there is but little really historical evidence upon it.

Nor has the question, in speculations on early Roman legal history, been always confined to land, although I think all but very few fanatics will now agree that there is some difference, in this respect, between moveables and immoveables, and that the maxim, la propriété c'est le vol, will, in practical application, be usually confined to the latter class (see below, p. 211).

Patrimonium. A subject so far back in prehistoric times has generally no better basis for belief than the oldest

technical terms and their probable derivational meaning, checked, as this always must be, by later usage.

At the beginning of Gaius' second Book are two or three pairs of those favourite dichotomous divisions, which often run across one another so much that it is difficult or impossible to work them into one scheme. We may, however, by comparison of different passages from the same author¹ arrive at some conclusion as to what is meant by "things," i.e. articles of property, which are "in our patrimony." They are, on the one hand, objects of human (as distinguished from divine) right—jus here, as often, meaning ownership or control—on the other hand, they belong to individuals as distinguished from those which are regarded as belonging to a community². So that the expression sunt in patrimonio nostro may be fairly rendered by the paraphrase "come under the head of private human property."

Patrimonium, to judge from the context, is here apparently used rather in the sense of an aggregate than of a right³. Proprietas nostra, the expression in the corresponding passage of the old Epitome of Gaius⁴ is scarcely a correct synonyme, unless it also had come, as is possible in the late Breviarium Alarici, to mean the aggregate of a man's means. In its original signification, the word patrimonium, if old, as it probably is, points, like dominium, to individual ownership. It would seem to indicate the total belongings of a paterfamilias, as matrimonium may indicate the general status of a materfamilias⁵.

The latter part of the word, however, is merely a suffix⁶—it contains, in itself, no specific indication of *descendibility*, as has been argued; though the adjective *patrimonialis* is no doubt said of some things which came down from a father,

¹ e.g. Gai. 2. 1, 2, 9—11: Dig. 1, 8. 1, pr.

³ See Austin, 47, pp. 817, 819.

⁵ See § 3, p 79

² Gaius, 2. 2, 11.

⁴ Epit. 2. 1. 1.

⁶ Corssen², i. p. 573

and descendibility has been employed as a test-mark—an inadequate one, to my mind⁷—of what constitutes a man's "property." On the other hand, this designation of a "property" as the belongings of the *pater* appears to me a distinct argument against the view, sometimes maintained, that the Roman *paterfamilias* had only a sort of joint ownership with, or trusteeship for, his legal successors (see above, § 3, p. 62).

Amongst other words used in the same aggregate sense, some, of more general character, such as res, bona, facultates, have been discussed elsewhere⁸: some, of special significance, such as familia and pecunia have a distinct bearing on the enquiry now before us, and will be considered shortly hereafter.

The common ownership, however, which is contrasted with patrimonium in Gaius' Institutes^{8a}, is not the subject of our present consideration, being that of an entire populus or civitas—in the case of air, sea and running water, as described by Marcianus, that of "all nations" or the whole world⁹—whereas what is now to be connected or compared with the developement of private ownership at Rome, is that of an individual Roman gens. I have therefore here nothing to say about the res communes and publicae and the res nullius—with which indeed the Roman Institutes, as dealing only with Private Law or Right, have little to do beyond their occasional conversion into private property by occupatio, alluvio, &c.¹⁰

It is in the *gens* that an original common ownership of land, and even according to some, of moveables, has been maintained, on the evidence of old terms and early enactments, or on inferences drawn from analogous cases elsewhere.

⁷ Jurisprudence, ii. pp. 549, 550. ⁸ ib. pp. 545, 546.

Sa Gaius, 2. 11 compared with Just. 2. 1. 6 and Marcianus, Dig. 1. 8. 6. 1.

Dig. 1. 8. 2. 10 Gaius, Dig. 41. 1. 7. 5.

The principle of common or collective ownership, particularly in land, has been represented, by many modern authorities, as prevalent, if not the rule, in all very early associations of men^{10a}. Partly, however, from migrations or conquests, and the consequent allotment of portions in severalty; partly from the almost necessary private character of the homestead, in any permanent settlement; and partly from accretions to these early beginnings, absolute ownership in severalty, even of land, is found to be soon established, and tends to become the rule, whether collective ownership, to a diminished extent, continues to subsist by the side of it or no¹¹.

Of these two somewhat conflicting statements, the latter appears to be fully as well supported by evidence as the former, which is, in one of the two authorities quoted, a generalisation from a work written with a special object la—a return to some reformed kind of collective ownership in land, from the evils which the author attributes to the Roman legacy of "quiritary (=individual) property." My concern at present is not with the practical bearing and intention of M. Laveleye's work, on modern politics or economics length, but with the probability of private ownership having been enjoyed, as a fact, by the particular elements of the early Roman Polity.

As regards the natural and fundamental division of moveables and immoveables, it is obvious that land, both in theory and traditional history, lends itself more readily to a common or collective ownership, which appears, so far as

 $^{^{108}}$ See inter alia Maine, A. L. pp. 259, 260 : Laveleye, Primitive Property, pp. 337, 338, &c.

¹¹ Stubbs, C. H. i. ch. 5, § 36.

^{11a} This generalisation is drawn by M. Laveleye in the last chapter (27) of Primitive Property.

¹³ See Mr Leslie's Introduction, pp. xx, xxi, and the author's Preface, pp. xlii—xliv.

it existed in the case of Rome, to have been that of the gentiles 12a.

Property in moveables prehistoric. The developement of ownership in moveables¹³, may be fairly assumed as prior to any recorded human experience. A suggestion that it may have been unknown at Rome "before the reign of Servius Tullius¹⁴" can scarcely be taken seriously. The words of Gaius upon which it was possibly based—that all ownership was originally ex jure Quiritium¹⁵—merely refer to the distinction in modes of ownership, which had to be made when certain forms became legally necessary for the transfer of certain kinds of property. They certainly do not question previous private ownership whether of these or of other kinds. That such private ownership was at some prehistoric time confined to moveables may be urged with more shew of reason.

One of the principal arguments for this assertion is based upon the evidently clearer applicability of the old form for the acquisition of property ex jure Quiritium to moveable objects—notably perhaps living things—than to land 16. This point will be more fully considered in a special enquiry into early Roman modes of acquisition. At present I shall confine myself to a more general examination of inferences to be drawn from old Latin names for owner and for different kinds of property.

^{12a} This might perhaps be inferred from their ultimate tutela furiosi and inheritance ex intestate (§ 5, pp. 148, 149): but, like the expectant rights of the sui, it did not bar disposal of property, by the individual owner inter vivos (§ 3, p. 62).

¹³ Msr. 3 iii. p. 22.

¹⁴ Muirhead³, p. 40. The passages quoted in note 14 l.c. do not appear to bear this construction.

¹⁵ Gaius, 2. 40.

¹⁶ This argument, from mancipium, which probably dates before the Servian Constitution, is certainly stronger than Cicero's vague assertion that res, in Romulus' time, erat in pecore et locorum possessionibus (de Rep. 2. 9. 16), which has been relied upon as evidence that there was originally no landed property.

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Dominus, erus. Cuq bases an alleged order in the acquisition of private property, first in animals, secondly in slaves $(\delta\mu\omega\varsigma)$ upon the derivation, which he adopts, of dominus from domare to tame¹⁷. But it is at least as likely that dominus is connected with domus as the master, originally perhaps the constructor, of the House¹⁸.

Erus, the old word for Master, occurring so often in Plautus, in the old spelling, with the aspirate, is now generally recognised as wanting it¹⁹, and is accordingly separated by Curtius from the root $\chi \epsilon \rho$ -, with which he formerly connected it²⁰. In this he is not followed by Corssen, Jhering, Cuq²¹ and others who still regard erus as the Taker, a meaning which will suit almost equally well for moveables and immoveables. A more difficult, but more significant, word for our present enquiry is heres, at least in the derived form heredium, which we must consider presently. Meanwhile, a few words may be devoted to words from a phrase in the Twelve Tables, which has been pretty fully considered elsewhere²², as affording a significant description of "a Property" generally.

Familia, pecunia. These words have also been occasionally relied on, as proofs that Roman private property was originally confined to moveables. The most probable distinction between them, as legal terms—a distinction which can, I think, pace Girard (p. 250, n. 4), be quite clearly drawn—will be considered under the clauses of the Twelve Tables which deal with the devolution of these items of property. At present I can only premise that, in my opinion, the familia, which the agnati, failing sui, were to take, possibly included land of the deceased, as well as his agri-

root δεμ "von da binden."

Luq, i. p. 79: see also Jhering⁴, ii. p. 161, n. 215: Curtius⁵, p. 232, &c.
 Jhering, l.c.: Corssen, Beit. p. 249: Curtius⁵, p. 234 on δόμος from

See Wagner on Terence, Andr. 183. 20 Curtius, p. 199, § 189.

²¹ Corssen², i. pp. 170, 470: Jhering⁵, i. p. 110: Cuq, i. p. 79.

cultural stock and plant, while the identification of familia with the famuli, in the sense of slaves, is by no means so certain as to found any conclusion of the property in general having been once confined to moveables²³.

A few words expressive of private ownership or property, other than those considered here, are added in an Appendix.

Hortus, heredium. Proceeding upwards, from what is known, or comparatively so, to the unknown, I leave to the last the tradition of a Romulian, i.e. prehistoric, division of territory, with which our historians sometimes begin²⁴. The words, on which the present reasoning is based, come to us from the scanty fragments of the Decemviral legislation, but the things designated and the usage implied were doubtless already in existence, as in so many other cases, long before the drawing up of that Code.

We learn from Pliny that the Twelve Tables contained some provision, unknown to us, about a hortus and a heredium, both terms apparently applying to land: hortus, the smaller, answering to the later villa (country house); heredium, the larger, answering to the later hortus²⁵. Festus more explicitly tells us that, while hortus was the old name for the modern villa or country house, heredium was a small landed estate²⁸. In point of derivation both words may be ultimately traced to the same general fundamental idea of that which is occupied or taken²⁷. But, whereas hortus, and its congeners, merely add the specific notion of enclosure²⁸,

²³ See § 3, p. 53, and Jurisprudence, l.c.

²⁴ Dionysius, 2. 7: Livy, 1. 13: and see below, p. 214.

²⁵ Pliny, H. N. 19. 19. 50. In x_{II} tabulis legum nostrarum nusquam nominatur villa, semper in significatione ea hortus in horti vero heredium.

²⁶ Festus P. p. 102. Hortus apud antiquos omnis villa dicebatur: id. 99. Heredium praedium parvulum.

²⁷ Above, p. 212, nn. 20, 21. *Erus* is continually translated *nehmer* by German etymologers. See on *nehmen* P. J. p. 56.

²⁸ Compare its forms in other languages, e.g. Gk. χόρτος, Gothic, gards (house), garda (yard): see Skeat, Etym. Dict. s.v. Yard.

heredium has connected with it the more specialised one of being taken by descent or inheritance, heres having undoubtedly signified this particular kind of taker, at the time of the Twelve Tables, and most probably from the first formation of the word²⁹.

In what connection these two words come, in the Code, we do not know. As I understand Mommsen, he is disposed to take hortus, in the modern sense of house with garden, as constituting the first land subject to private ownership at Rome, such ownership being afterwards extended to a small portion of the general agricultural land, which was originally common. The heredium he therefore considers a second stage (see below, p. 221); by the word itself he understands to be indicated descendibility to personal successors, as against resumption into the common stock: not an obligation to leave the land to such successors, as against power to dispose of it inter vivos³⁰.

Coming now to see what light legend can throw upon the question we read, by the side of vague statements that Romulus "divided his territory into thirty portions, assigning one to each of his curiae," or "distributed it to his people³¹," the following more explicit testimony from our antiquarian authorities.

Centuria, centuriatus ager. The century meant, says

²⁹ Die besondere Bedeutung hereditate accipere, Corssen, Beit. p. 40. See however below, p. 223. The suffix ed has never been quite satisfactorily explained. Curtius⁵ certainly fails in the attempt. Cf. pp. 199, 200 with 623—638. Corssen's assumption of a verbal stem, here-, comes perhaps the nearest to success.

³⁰ Msr.³ iii. pp. 24, 25 especially n. 1 on the latter. But I confess that I cannot quite reconcile the meaning suggested above with the last sentence of the note. Compare too, l.c. p. 26 and Karlowa, ii. pp. 350, 351. Rivier, Fam. Rom. p. 10, n. 3 designates the heredium "Ce qu'il (le paterfamilias) a reçu de ses pères, et qu'il a le devoir de transmettre à ses enfants." Mommsen (History) derives the word directly from herus: it is translated "land of one's own" by Dickson (i. p. 239, ed. 1901). But see n. 31.

a Dionysius, 2. 7: Plutarch, Romulus, c. 17.

Festus, in military affairs a hundred men; in land two hundred jugera: centuriatus ager being land divided into portions of that amount: so called because Romulus divided sets of two hundred jugera to each hundred of his subjects³².

Varro³³ also informs us of the two-acre allotments given first by Romulus to each of his men, which, because they were understood to follow the *heres*, were called a *heredium*: these sets of two acres were the first unit of taxation.

In another passage^{33a} the same author, disregarding the human century, tells us that the landed one was first named from a hundred acres and, when doubled, retained its old name, as the tribes, when multiplied, retained theirs.

Both the passages of Varro contain a reduction of the jugerum into feet. Into this I do not propose to enter, nor into its relation in measurement and superficial proportion to our ordinary land unit; but will assume the Roman jugerum to be about five-eighths of our acre³⁴; the heredium therefore is little more than an acre and a quarter.

In these traditions there is, no doubt, as Mommsen puts it, an obvious dating back, of genuine historical assignments of public land, to a prehistoric time³⁵; and a good deal of ingenious argument has, as it seems to me, been wasted on

³² Festus, P. p. 53. Centuria in agris significat ducenta jugera: in re militari centum homines. ib. Centuriatus ager in ducena jugera definitus, quia Romulus centenis civibus ducena jugera tribuit. As to the derivation of century see § 8, p. 285.

³³ Varro, R. R. 1. 10. Quantum as antiquos noster, ante bellum Punicum pendebat. Bina jugera, quod a Romulo primum divisa dicebantur viritim: quae, quod heredem sequerentur, heredium appellarunt. As to the meaning given above to *quod* with the subjunctive see Roby, Grammar, ii. p. 324, § 1744.

 33a Varro, L. L. 5. 35. The increase of the tribes is explained by Columella (5. 1) to be from the original 3 attributed to Romulus, see § 6, p. 229.

³⁴ Anyone who is curious about such matters may consult Eyton's Key to Domesday, p. 30, and compare the passages of Varro with Isidore, Origines 15. 15.

35 Msr. 3 iii. p. 25, n. 1. He takes the colonists sent to Anxur 329 B.C. (Livy, 8, 21), as the first unquestionable instance. (ib. p. 24, n. 1.)

shewing how a small plot-an acre and a half at mostcould never have sufficed for the maintenance of an individual. still less of a family36. The best reasoned authority, that I can find for this view, is not however by any means, to my mind, conclusive. It is based mainly on a not very intelligible passage of Cato³⁷ as to the yearly amount of wheat necessary for the maintenance of a slave, with a rough estimate of the productive capacity of Roman soil. But it does not seem to take into sufficient account the simpler requirements of an age content with very rude fare38, the capabilities of the heredium under an intensive culture, and the probable contributions to this primitive menage from the kail-yard, or literal garden-patch, under a thrifty house-wife39. I assume, in accordance with proved analogies, and an almost universal interpretation of tradition, that some right of pasturage, or even periodical agriculture, in the land left common, accompanied the heredium40.

To wind up this part of my argument, I think we cannot but conclude, when we come to the time of the Servian reform, that private property in land, to a considerable

 ³⁶ Girard⁶, p. 261, n. 1 quoting, inter alia, Mommsen's note on "Hist. i. p. 252, n. 1." See below, n. 39.
 37 Cato, de R. R. c. 56.

³⁸ Pliny, H. N. 18, as to far and triticum particularly § 83: also Varro, R. R. 1, 44.

³⁹ Pliny, H. N. 19. 4. 52, 57. Cf. the holera described with such delightful gusto by Virgil, Georg. 4. 127—148. This, too, when the great estates, latifundia, had already been ruining Italy for two hundred years (from Cato's time). See Pliny, Book 18 passim, e.g. 8, 35. Some of these considerations are taken more into account in the last form of Mommsen's note referred to by Girard. He adheres however very positively to his first view. See Hist. i. pp. 239, 240 of Dickson's translation, ed. 1901, from the 4th German issue.

⁴⁰ It is surely needless to quote parallels for such a very widespread usage in early nations. I may add, finally, that the possibility of some private property in land dating from the prehistoric period corresponding to the reign of the first king, is confirmed by the express attribution of metes and bounds to the second. See Dionysius, 2. 74: Festus, P. p. 368, Termino: and on the subject generally below, § 16, pp. 504 sqq.

extent, must have been well established before any such system, as that which goes by Servius' name, could have been thought of. The very probable identification of the bina jugera with the Servian unit of taxation will be more particularly considered hereafter: but I must remark here that it certainly does appear to be indicated, although briefly and obscurely, in the passage from Varro quoted above (n. 33).

As to the alleged Romulian division of land, opinions will, no doubt, continue to vary between those who regard it simply as a fanciful anticipation of historical allotments made in later times, and those who treat it, as I understand Muirhead to do, in the light of an actual fact. I am afraid I must persist, spite of all warnings, in my endeavour at a rationalistic explanation.

Romulus apart, there does not appear to me anything improbable in the marshalling of an invading Host by hundreds and tens of warriors⁴¹, nor in the assignment of portions of territory, at least to the larger divisions. That the smaller sets of ten may preferably have consisted of persons related to each other⁴² is conceivable and not perhaps without parallel in our own case^{42a}. The division, in detail, to the individual members of the conquering Host, is less likely to have been the work of such a Host, as a whole, or of its tribunus, than of the several subdivisions among themselves⁴³. Such a viritim assignatio, as is attributed to

⁴¹ See § 5, p. 170 &c.

⁴² See § 9, n. 34, though the Homeric idea there quoted, does, I admit, apply, strictly speaking, to the *curia*, or its Greek parallel, rather than to the *gens*. See however Vinogradoff (Manor, p. 140) on the allotment of territory to *maegths*; also Kemble, i. p. 230 and Pearson, above, p. 203.

⁴²a Above, § 5, pp. 198, 199.

⁴⁸ Compare the above generally with Stubbs, C. H.⁶ i. pp. 103–114 and the latter part of Schmid's article Hundred. It may be my inobservance, but I cannot find either in P. and M. or in "Domesday Book and Beyond" any definite pronouncement on this question. Round (Feudal England, pp. 97, 98) is somewhat against the view here taken, which undoubtedly smacks of Freeman.

the Roman founder, belongs, I must admit, to later times, of colonists publicly sent out⁴⁴: of any earlier arrangement of the kind we have no direct evidence, only legend, though we may perhaps be justified in hazarding some inferences from our scanty antiquarian traditions of sortitio (see below, p. 220).

Distinction of original settlement from later ager publicus. In any case, a distinction must be drawn between the supposed common land of the original settlement and the later ager publicus. The former belongs to a primeval, and what we may almost call a Horde, acquisition. It is the work of gentes, or army divisions not yet coagulated into gentes, certainly not into a State; and the territory acquired somewhat resembles land "occupied" by individuals under the Law of Nature imagined by the later Roman Jurists⁴⁵. On the other hand, the ager publicus, in the ordinary sense, consists of conquered territory acquired en bloc by the people, or State, as a whole, and any distribution to citizens of plots of land—bina jugera or otherwise—is a grant by a corporate body rather than an assignment or apportionment by joint owners among their own number, which is more probably the character of the original heredium46.

Alienability of heredium, inter vivos. In the words of Varro quoted above—quod heredem sequerentur—it is not clear whether descendibility to, or inalienability from, heredes is predicated of the original heredium. Mommsen appears to claim for it an original exclusion of right of sale by the so-called owner; which however he admits to have been established for landed property in general, though not expressly for the heredium, by the Twelve

⁴⁴ See Karlowa, i. p. 92, also below, pp. 220, 221, and above, n. 35.

⁴⁵ See Gaius, Dig. 41. 1. 5—7; Instt. 2. 69: Pomponius, Dig. 49. 15. 20. 1, &c.

^{*6} The compascuus ager of Festus, P. p. 40 s.v. left over by the divisores agrorum as Isidore (Orig. 15. 13) tells us, belongs obviously to the later system.

Tables. It is certainly difficult to reconcile the provisions of usucapio as to a fundus in that Code, with anything but an unrestricted power of alienation inter vivos: or the limitation in the case of the legendary Romulus, with the full power of alienation which may be inferred from the boundary law of the legendary Numa (above, n. 40).

It must be remembered throughout that the reasoning about the original heredium applies principally to the case of the original patrician gentes. To a considerable extent, no doubt, the institutions of this circle, which certainly at an early period became closed, were copied or applied in similar bodies (stirpes) formed, at Rome, among outsiders⁴⁷; for the laws of developement, so far as the mere fact of gentile association went, had nothing intrinsically peculiar to patrician cases, but might be equally prevalent under similar circumstances elsewhere. But it is possible, as is suggested by Karlowa^{47a}, that the formal incorporation of the plebeians with the old gentile community, and the general reorganisation of land tenure and militia duty in the Servian system would go to confirm the acquisition of a complete right of alienation of landed property inter vivos.

As regards testamentary disposition, to judge by what remains of the Twelve Tables, the power to appoint heredes, or at least to select among those who would be entitled to succeed on intestacy, does not appear to have been in any way limited by the Code, as to the class of property concerned, though the power of willing away from the heres by legatum was, according to Ulpian and Paulus⁴⁸, confined to the pecunia or res nec mancipi.

^{47 § 7,} pp. 260 sqq. and Msr.3 iii. 74.

⁴⁷a Karlowa, ii. p. 353.

⁴⁸ Ulpian, 11. 14: Paulus, Dig. 50. 16. 53. pr. reading super pecunia tutelave suae rei. Compare the familia pecuniaque of Gaius, 2. 104 which may indicate, in the testamentary mancipation, an increase of testatory power over that referred to by Paulus, l.c.

A certain control was exercised by the Curiate assembly over the alienation of a property per universitatem by arrogatio and the earlier forms of testation (see below, § 10, p. 373 and § 14, pp. 442 sqq.). But this control did not relate exclusively to land, and pertained to the gentile state⁴⁹ generally, rather than to the residuary interests of the gens or Family. It was matter of national interest or policy, not a question of common or private ownership.

Sors. I have hitherto postponed consideration of the idea of *allotment*, which occurs, from time to time, in our notices of the passage from common to private property in land.

Frontinus, in treating of the first measurement of land, computes the contents of a jugerum and of a quadratus ager consisting of two jugera. This was, according to him, originally called a sors, and this measure, when drawn into hundreds, a centuria⁵⁰. I do not vouch for the perfect accuracy of the translation, but I think it is clear that his centuria is the land centuria, or centuriatus ager of Festus quoted above (n. 32), and that the sors is the old heredium. The word sors itself is explained by Festus⁵¹ to be, in one sense, a man's patrimonium, in another, the answer of Heaven to enquiry by drawing lots. Varro52 in the somewhat obvious statement that sors is quod suum fit sorte, incidentally notes the special use of the word, in loans at interest, to mean the principal. This use is best accounted for by the analogy of landed property as opposed to its produce53.

⁴⁹ See Jhering⁵, i. p. 205.

⁵⁰ Frontinus, 2. 30: Blume, etc., Schriften der Röm. Feldmesser, p. 30: Bruns, Fontes Iuris², p. 249. This passage is not very clear and is omitted in the later editions of Bruns. Cf. Varro, L. L. 5. 34, s.v. Ager.

⁵¹ Festus, F. p. 296 s.v. and P. p. 72, Disertiones.

⁵² Varro, L. L. 5. 183.

⁵³ Fenus, to which sors is opposed, is well compared by Curtius⁶ (pp. 252, 304) with $\tau \delta \kappa \sigma s$.

On the whole there is no difficulty, or straining of natural meaning, in taking sors to be an assignment of territory by lot. This transition of meaning certainly occurs in the Greek $\kappa\lambda\hat{\eta}\rho\sigma_{0}$ as early as Homer⁵⁴, and in conjunction with an epithet shewing that the $\kappa\lambda\hat{\eta}\rho$ os consists of land, as distinguished from an olkos55. The connexion of the lot with measuring lines and heritage will occur to any reader of the Old Testament accounts of Jewish conquest, and the metaphorical language of the Psalms. When, i.e. at what stage, and for what persons, the individual, the gens, or the military division, the use of the lot came in, we have no direct evidence enabling us to decide. The various expressions cited above are, to my mind, in favour of an assignment, by consent, of a certain district to one of the larger army divisions generally, and the subsequent subdivision of such district, amongst its assignees, in measured portions, by lot. This does not quite agree with the conception of Mommsen, if when he speaks of the heredium, as a second stage, he means that the hortus or homestead is first separately acquired, in private ownership (he does not say how, see above, p. 214); and there is certainly less improbability, in the above suggestion, than in the idea of a scramble for the best homesteads, and a subsequent allotment of the patch for culture. A periodic change of the latter, for temporary enjoyment, has no doubt its parallels in alleged medieval custom of our own country⁵⁶; but there is little or no Roman evidence for such periodic enjoyment either generally or in connexion with the lot.

Sortire, &c. In leaving the subject of the lot, as a method for assignment of shares or heritages, I cannot

⁵⁴ Homer, Il. 15. 498; Od. 14. 64.
55 ἀκήρατος.

⁵⁶ See Seebohm, English Village Communities, pp. 239, 240, Lewis, Ancient Laws of Wales, Pt. i. ch. 5, &c. I am bound to admit that Mr Lewis appears to consider most of the divisions which I attribute to an early military arrangement as matter of later assessment.

refrain from some notice of the manner in which it seems to have been physically worked, on account of some curious results in modern language.

The remarkable expression of Homer, that Ajax's lot *leapt* out of the helmet, which Nestor shook (II. 7. 181, 182), points to some means, human or mechanical, of making the slips of wood, on which the names were written, *come forth*, or appear to come forth, in a certain order, *automatically*, as shewing the intervention of supernatural power (see above, n. 51).

It seems incredible, but I believe it to be true, that the modern words sortir &c. are most probably derived from this circumstance⁵⁷, in what we call drawing of lots, which latter phrase connotes an entirely different class of ideas, as does the Latin word sors—i.e. that of taking one after another, cf. series⁵⁸.

Conclusion. The hypothetical conclusions, at which I have thus arrived, are submitted with very various degrees That there ever was a period of community of confidence. in moveables at Rome, or a restriction generally upon their alienation, I think in the last degree improbable. Moveables are, it is true, peculiarly capable of the form of alienation (mancipium) generally attributed to the Servian system, which is at least as old as the beginning of the Republic. But that system affords, according to the ablest among modern interpreters of it, strong evidence that the principle of private or several property in land had already become thoroughly established: in fact the original community of land, whether among the gentiles or some larger body, is much more matter of inference and analogy, than is several landed property. The peculiar form, and publicity, required for the transfer of property in land and agricultural stock

⁵⁷ See the very interesting article in Pianigiani s.v. Sorte and Sortire, also Curtius⁵, p. 354. For other explanations Diez (ed. Donkin), s.v. sortire.

⁵⁸ Wooden tablets arranged upon a string are suggested by Mommsen, Hist. (Dickson, 1901), i. p. 229, n. 1. But I do not see how the hand of Heaven is to come in.

(familia), resulted from the primary importance of such property in a system of registration for purposes of taxation and graded military service. It would seem probable, from the special regulations, whatever they were, in the Twelve Tables, as to the heredium and the hortus, that, whether the homestead was or was not the first portion of the conquered territory enjoyed in severalty, a certain small allotment, as well as the agricultural stock connected with it, was bound originally to go to the legal personal representative of a deceased Roman: other property (the pecunia or res nec mancipi), might be left away from the heres by legatum.

On the circumstances of the allotment of a heredium we have no evidence: all is pure hypothesis. It seems, to me, more probable that this may have been done by the gens, or the nucleus of a gens, amongst themselves, uno ictu, than that the homestead (hortus) was "occupied" first by the individual warrior, and the heredium assigned after.

APPENDIX TO § 5A

Names of owner and property, p. 224. Enclosure, Zεῦς ἔρκειος, Hercules, 225. Dominus, δεσπότης, 226. Κύριος, ib. Erus, 227. Κτέρεα and root κτα-, ib. Mine, thine, ἴδιος, 228. Privus, ib.

On the subject of this section, as on many other early social questions, I have ventured to consider etymology and the explanation of archaeological writers as furnishing a more secure basis of reasoning than either philosophical theory or the traditions which pass for early history; though I must maintain, as against the thoroughgoing scepticism of such as Prof. Pais and his school, the possibility of discerning certain types or principles approximating to truth, in traditions of an obviously national or indigenous character.

Several fundamental or prevalent terms for owner and property, in the Indo-European group of languages, have been already considered in the present part of this work and in that on Jurisprudence which preceded it. A few others which have not so prominently claimed my attention are here added.

But I must begin with a necessary disclaimer. It is solely with a view to the historical development of Roman Private Law, and of Roman Constitutional Law as connected with Private, that the enquiries in this volume are pursued. Their object is not the economic history of Rome, or its comparison with that of other countries. Consequently, such a work as that of M. Laveleye (on Primitive Property) is only used by way of illustration. With his main thesis—the advantages of communal, as distinguished from individual, Property in Land, and the possibilities of its modified reinstitution—I have nothing to do. I can only employ some of the materials, which he and others have so laboriously collected, as analogies, assisting me to piece out the very

slight amount of evidence which we possess as to the original constituent elements of the Roman State.

With regard to the immediate subject of the present section, M. Laveleye describes "the Romans" as having passed through the two successive stages, of the Village Community and the Family Community, before they establish (which they are the first to do) exclusive individual property in land⁵⁹. By the two stages he apparently means what I prefer to regard as two aspects of the gens. I cannot exactly identify these with stages that I can recognise: but I am willing to admit a general community of land, once existing, for a short time, between the individual men or families. constituting a division of the original host, or a nascent gens. As to exclusive individual property, it seems to me, that such property must be recognised in the Roman paterfamilias, certainly as regards moveables, from the beginning, and as regards land, from a very early period, only preceded, in fact, by an invasive conquest, and the temporary community above referred to.

How the gentes combined to form the curia, and the curiae were reorganised into the State, is a question which has been partly answered in § 5 and will be continued in § 9 in my further investigation into the gradual approximations to the idea of true Sovereignty.

Meanwhile—to return to a consideration of the names for owner and property—the former seem generally to indicate either the headship of a household or acts of physical acquisition; the latter either the most important groups of living creatures subject to such head, or proximity to his person, perhaps as being acquired by him.

Enclosure is clearly a very early idea with reference to land (above, p. 217). It has indeed been questioned whether the Hercules, who was obviously an important object of

⁵⁹ Laveleye, Prim. Property, ch. 12, p. 163.

early rustic worship at Rome, may not have been, in reality, an indigenous God, of the *close*, instead of the Knight-errant Son of Alcmena⁶⁰.

Dominus, δεσπότης. Of private or several ownership, as a juridical abstraction, we of course find no early attempt at definition: such a complex of rights, in the unsophisticated thought of ancient times, was no doubt simply conceived as the master's power to do what he likes with his own. Dominium, however, has been considered elsewhere, and one of the many derivations suggested for dominus has been compared with our own "Lord" I am rather inclined now to prefer Brugmann's connexion of this word with domus, which, in its turn, is obviously traceable to the root dem-, possibly, further back, to that of da- (binden), as the wattled enclosure 62 . So too the Greek word $\delta \epsilon \sigma \pi \acute{o} \tau \eta s$ may mean the protector or maintainer of the house, if we accept the least unsatisfactory among the five explanations given by Curtius for the first part of this difficult word 63 .

The significations of pater and familia have been dealt with already in § 3 and Jurisprudence. $K\acute{\nu}\rho\iota\sigma\varsigma$, another word for the head of the family (most probably with reference to wife and children) is, no doubt, the mighty one (Mächtig, Herr), compared by Curtius⁶⁴, inter alia, with the Cornish

There was undoubtedly more than one Hercules (Pliny, H. N. 11. 17. 52). The Rusticellus seems scarcely accounted for by the one strange story of superhuman strength (id. 7. 19. 83). The idea of a native Hercules or Herculus, protector of enclosures (like the Greek Ζεὐτ ἔρκειος) was formerly suggested by Mommsen (Unterital. Dialect. p. 262), and accepted by Bréal, but appears to be abandoned by the former in later editions of his History. See Daremberg et Saglio, article Hercules, iii. p. 124, n. 36.

⁶¹ Jurisprudence, ii. pp. 738, 739, n. 13. See also above, p. 212.

⁶² Curtius⁵, p. 234.

⁶⁵ id. § 377, pp. 282, 283. For the second part compare Curtius, § 348, p. 269 with Corssen², i. p. 424.

⁶⁴ Pp. 158, 159. To the notes there should be added Festus, P. p. 99. Heres apud antiquos pro domino ponebatur. But this is probably merely a comic liberty. See Plautus, Men. 3. 2. 28.

Caur (gigas), in the reduplication of which word we may recognise an old friend (or old friend's enemy) Corcoran.

us, with its somewhat questionable descendant heres, has been explained above 64a , and we have also seen how familia and pecunia 65 , as names for different kinds of property, throw some light on the questions discussed in the present section. To this latter class of words belong $\kappa\tau\acute{e}\rho\epsilon a$, $\kappa\tau \mathring{\eta}\nu o\varsigma$ and $\kappa\tau \acute{\iota}\lambda o\varsigma$. The first, and most general, word comes to us nevertheless, in early usage, exclusively in particular connexion with the ancient practice of doing honour, or service, to the dead, by burying with him his choicest possessions 66 , but, though most interesting in this connexion, does not give us any help as to the original conception of the possessions themselves.

Κτέρεα and root κτα-, faihu. The true original meaning of the root kta-, to which certainly most of the Greek words for possessions owe their origin, is very difficult to determine. The most probable one, which has been suggested, is that of the killing $(\kappa \tau \epsilon \nu - \kappa \tau a -)$ or the capture and taming $(\kappa \tau \iota \lambda \acute{o} \omega)$ of animals⁶⁷. The latter would seem to be preferred by Curtius. from his comparison of κτηνος, in point of meaning, with paku (Lat. pecu-) as das gefangene (§ 343, p. 268). It would be going too far afield to enter into the philological questions connected with faihu, which corresponds, under Grimm's law, with pecu- in Latin. Since, in the older Maeso-Gothic of Ulfilas, faihu bears already rather what we are disposed to consider the derived or secondary meaning of property generally, than that of cattle, it is scarcely safe to rely upon the word as affording proof of any order in acquisition, i.e. moveables first, immoveables later. This caution need not

⁶⁴a P. 212.

⁸⁵ See § 3, p. 53 and Jurisprudence, p. 544.

⁴⁶ Homer, Od. 1. 291 σῆμά τε οἱ χεῦαι καὶ ἐπὶ κτέρεα κτερείξαι, &c. Cf. Schiller's beautiful lines in Nadowessier's Todtenlied, Bringet her die letzten Gaben &c.

⁶⁷ Cf. Amazons in the interesting chapter of Herodotus, 4. 113.

however prejudice the arguments which have been drawn from the original meaning of *vieh*, *fee*, &c. as to the probable origin of *feudal* service and tenure⁶⁸.

Mine, thine, τδιος, privus, &c. I may conclude with a few general terms expressing either ownership or what I have elsewhere termed own-ness⁶⁹, but which have little or no bearing upon the specific question of individual property in land. Mine and thine are pronominal adjectives, his and her true genitives⁷⁰ but they scarcely amount to the expression of an abstract idea. Something more approaching that, was perhaps attained early in Greek, where ἴδιος, originally an adjective of the reflective pronoun, occurs, in Homer and Pindar, with the sense of private as opposed to public.

Several or individual appears to be all that is expressed in the Latin word privus, the derivation of which is very unsatisfactory⁷². The same must be admitted of the adjective from which comes proprietas (own-ness, Jurisprudence, l.c.), and which appears to me to mean simply that which is near one⁷³. More significant and interesting is the English own, which is originally a past tense signifying I have worked, I have earned⁷⁴. The German words eigen, eignen, &c. are of course from the same origin.

⁶⁸ See Maine, E. L. and C. pp. 346, 348, &c.

⁶⁹ Jurisprudence, p. 738, n. 13.

⁷⁰ Morris' English Accidence (1895), §§ 171, 172, p. 180.

 $^{^{71}}$ See Curtius on fibios, pp. 635, 636 also § 601, p. 393. Instances are Hom. Od. 4. 314 δήμιον $\hat{\eta}$ thion: Pind. Ol. 13. 69 έγω δὲ thios ἐν κοιν $\hat{\varphi}$ σταλείς κ.τ.λ.

⁷² Corssen² (i. p. 780) takes it from an old form *pri* or *prae*, as meaning originally standing forward, conspicuous. From this to *private citizen* (*Einzel-bürger*) is surely a long step. See however, id. Beit. p. 433.

⁷⁸ I have a little authority for this derivation of *proprius* in a note by my late friend Prof. Skeat—a note which I cannot, alas, verify now. Jhering, after Pott, takes it to be *pro privo*.

Nee Morris, English Accidence, § 319.

§ 6. THE ROMULIAN TRIBES

ALLEGED Romulian division and modern theory, p. 229. The number three and the word tribus, 230. Signs of duality, 231. Tities, Sabini, Latium, Roma, 232. Racial character of first two tribes, 233. Quirites and Quirinus, 235. Early period and third tribe, 236. Its racial character, 238. Tomb at Vulci, ib. Caelius and Aulus Vibenna, 239. Tarquins Etruscan and Etruscans generally, 241. Populus and tribus, developement of Sovereignty, 242. Pilumnoe poploe, populari, ib. Tribus as an independent entity, ib. Early recurring numbers, 244. Tribunus, denary and ternary numbers, 245. Results or postulates, ib. A pre-Servian revision, 247. Confarreatio and decuriae, 248. Conclusion, 250. Three Deities, ib. Roman populus and Anglo-Saxon Kingdom, 251. Appendix, 252.

The Romulian tribes. The Romulian tribe has but little to do with the constitutional, and scarcely anything to do with the Private law of later Roman history. But it was probably what suggested the actual land divisions afterwards represented in the historical comitia tributa¹, and its Headman (see below, p. 245) gave the name, or even the model, to the headmen of the Plebs, who had so much to do with building up the structure, which we know, of Roman Law in general, and Roman Private Law in particular, see § 7, p. 273.

I have referred repeatedly (§ 1, pp. 11, 12; § 5, p. 137) to Romulus' alleged division of his people into three tribes, and each of these again into curiae and gentes. I must at

¹ See Msr. ³ iii. p. 96, n. 1.

present say a few words on the reputed Romulian tribe considered independently as a unit.

This traditional division into three tribes, has been largely replaced, in modern theory, by a supposed coalition of two, with the subsequent addition of a third. The obvious difficulties connected with this replacement of the former by the latter view, require and justify a certain amount of philological, as well as semi-historical, enquiry.

The number three and the word tribus. Throughout the Romulian system we find the above number continually recurring, due, of course, to the three original tribes. But the word tribus is misleading, from its very connexion with Roman legend, and has evidently been regarded with suspicion by several good etymologers who have dealt with the word per se². I give various suggestions in my note, confining myself, in the text, to the conclusion at which I myself have arrived, i.e. that this word has etymologically nothing to do with three, but is rather to be connected, as

² There is an Umbrian word trefu or trifo, which, in connexion with the Roman tribus is explained by Corssen², i. p. 163 to mean originally a whole consisting of three parts, but ultimately one of the three parts themselves. The second syllable he identifies with the root bhu appearing in the Greek word φυλή. This derivation is not regarded as satisfactory by Brugmann, ii. p. 297 ("Kaum aus tri drei + W. bhu"). Leist, Gr.-Ital. Rg., describes it (p. 114, n. 1) as zu gewagt and nicht nachgewiesen. Mommsen, in his History (Dickson, 1901, i. pp. 54, 85), explained tribus to be a part which once was a whole. In his later Staatsrecht (iii. 95, nn. 2, 3), recognising the objection to admitting the numeral as a primary element of the word, he inclines to the view of Curtius who connects tribus with the Celtic treb (vicus) and trebou (turmae) (p. 227)*. Pictet, Origines, § 276 (ii. p. 291) quotes Ebel as connecting the Celtic treb and tref, tre (demeure, ville) with the Latin tribus, to which he himself adds a questionable Skr. congener trapd (famille). But this group of words, to which we may perhaps add our English thorp (App. to § 5, p. 202, n. 224) is probably only European.

^{*} According to Seebohm (T. C. p. 35) the word tref, though generally used for a homestead or hamlet, seems from its other meanings to involve the idea of a group.

a whole, with words in cognate languages meaning troop, host or clan. On this view, the oft-recurring factor in the Romulian system is, either purely legendary, or accidental and secondary, not fundamental, the three Romulian tribes being originally separate, and fused together on different occasions³.

Signs of duality. This exclusion of the factor three, from the earliest beginning of the Roman People, is better reconcileable with the considerable traces, which we find, of an original union of two tribes and the subsequent addition of a third, indicated by the undoubted persistence of a duality which reappears continually even in subsisting institutions of the later Republic3a. Among these I may mention some of the most ancient and remarkable instances: two sets of Salii (the Quirinales and the Collini), or, at least, a dual attribution of their ritual, to Hercules and Mars4: two sets of Luperci, the Quinctiliani of the Palatine and the Faviani of the Quirinal5: two families engaged in the worship of Herculese; duoviri in the procedure perduellionis, § 19, p. 599, &c.; two original Pontiffs, strictly so called7; possibly two original tribuni (chieftains), suggesting the number of the first tribuni plebis (according to the more

³ Msr. ³ iii. pp. 96, 97. See also below, p. 236.

³a Msr. ll.cc. and p. 100, n. 1.

⁴ Servius on Aen. 8. 285: the two deities are, however, apparently identified by Macrobius, Satt. 3. 12. 6—9.

<sup>Mommsen, Hist. (Dickson, 1901), i. 4, p. 67. See Festus, P. p. 87, Faviani.
Servius on Aen. 8. 270: Festus, F. p. 237, Potitium et Pinarium.
Macrobius, Satt. 3. 6. 12—14: see, however, App. 1. to § 5, p. 185.</sup>

⁷ It was the pontifex minor (one of two) who, in the earliest times, proclaimed the division of the month by the phases of the moon, at an assembly summoned by the rex. See however § 14, p. 430 and compare Servius on Aen. 8. 654 with Macrobius, Satt. 1. 15. 9. He became Maximus, after the three Flamens were made into one board with the Pontiffs, and the original headship was reduced to a mere ritual office. See Festus, F. p. 185, Ordo. On the whole, however, of this difficult subject see Zumpt, Criminalr. i. p. 420, n. 61.

general account)—although it is possible that the latter were merely an adumbration of the consuls⁸, who, whatever may have been the first design of their duality, soon became both simply members of the patrician order. The further dualism which appears to be expressed in the style patres minorum gentium, the Fathers of the younger or newer gentes, does not, I believe, indicate an original union of two bodies, but the later addition of a third to two already united⁹.

Tities, Sabini, Latium, Roma. I need scarcely say that the two tribes, referred to as forming this dual body, are the Titienses and Ramnes of Festus and Varro¹⁰. The third of the three attributed to Romulus-the Luceres, who always come last, are named from a chieftain of Etruscan style, Lucumo¹¹, who is strangely enough represented as an ally of Romulus against the Sabines in the war preceding the joint reign of Romulus and Tatius. I postpone, for the present, this third element. As to the former two, whether their names were respectively connected with that of Rome and its reputed founder, and with that of his coregnant Tatius¹², or have nothing to do with either, I do not presume to decide. I think, however, it is clear that the names Tities, and Titienses were always considered to represent a Sabine element, whether we call the other Latin or Roman, and that the two were most probably of cognate, or even closely related, breed. They belonged undoubtedly to the Aryan or Indo-

⁸ Mar. 8 ii. p. 273.

Below, pp. 237, 241; § 8, p. 292. See however Msr. iii. p. 845.

¹⁰ Festus, F. p. 344, Sex Vestae: Varro, 5. 55.

¹¹ ll.co. and Čicero, de Rep. 2. 8. 14. I follow the usual view that the word Luceres is Etruscan. See Servius ad Aen. 8. 475: contra, Corssen's note in ii. 2 85 where he gives significations of Roman description to all three names. "Ramnes für Rapnes, ursprünglich nicht Räuber sondern rapidi: Tities, neben Titus, die geehrten, honesti; Luceres, die leuchtenden."

¹² They are derived from the heroes in question by tradition as old as Ennius. See Varro, l.c.

European stock, and to that branch of it which settled in Latium, the broad ¹³ plain bounded on the North by the Tiber, on the West by the sea, on the East by the Sabine mountains and on the South by tribes belonging to the same branch, but not so closely related to one another as the Latini, whom we shall find from early times (but possibly later than the συνοίκισις of Rome¹⁴, linked in a loose confederation known as the Latin League.

Rome itself, perhaps derivationally the Stream-town¹⁵ was founded by the settlement of these two tribes (Latin and Sabine) upon the low hills arising from the swamps of the Tiber, on the northern border of Latium.

Racial character of first two tribes. I must here recur, for a short time, to the particular indications which have been previously (§ 1, p. 18; § 3, pp. 87, 103) pointed out, of a certain difference, in ethnical development, between the two constituents of the earliest Rome. To this blend of slightly different racial elements, with the important subsequent addition of a third, has been, perhaps somewhat fancifully, referred the peculiar nature of the Roman people, with its sober and enduring character, which, it is observed that mixed races often possess rather than pure ones¹⁶. This general idea has been carried out in more detail by an

¹⁸ See Curtius⁵, pp. 216, 278 citing Festus, F. p. 313, Stlata, as against Corssen², i. p. 174 who, on second thoughts (Beit. pp. 149, 462) would seem to prefer, at least for the adjective latus, a different explanation.

¹⁴ See, on συνοίκισις, Thucydides, 2. 15; 3. 3. The centre of the Latin League, we know, was Alba, and the common sanctuary on the Alban Mount. Query were both the League and the choice of this high fort (cf. Corssen's interesting comparison (i. p. 485) with such names as Leuchtenburg, Weissenfels, &c.) the result of Porsena's conquest? See below, § 16, pp. 514 sqq.

¹⁵ This derivation of Corssen (i. p. 364, see too p. 536 and ii. p. 1012) seems to me much more probable than the entschiedenste views of Ritschl (Il.cc.) or Pais' strange interpretation of the ficus Ruminalis legend (Anc. Leg. pp. 55—57).

¹⁶ See Jhering⁵, i. pp. 310, 313—315, 322—324.

ingenious tabulation of the results due to what its author styles the religious as against the profane system, represented by Numa and Romulus. This will be found in a note to Muirhead's History¹⁷, which I do not reproduce here, because I venture to differ slightly from Jhering's views, particularly with regard to the double form of marriage, the origin whereof may, I think, be better accounted for directly by a union of two peoples than by an alternative of ceremonial in one¹⁸. I should remark, by the way, that, in this suggested original amalgamation of different elements, very little notice is practically taken of the third "tribe," which I shall accordingly continue for the present to leave out of consideration. As between the two that are mentioned above (p. 233), a more developed religious and ceremonial element must apparently be referred to the Sabine stock (see § 5, p. 146), evinced socially in a growing preference of the more solemn and enduring marriage union (above, § 3, pp. 87, 99, 103) and tending politically to the formation of a gentile aristocracy¹⁹. This view is not entirely in accordance with Roman tradition and some of the suggested

¹⁷ Muirhead², p. 5, n. 5, from Jhering, § 19 (the first passage quoted in n. 16).

¹⁸ Above, § 3, p. 103. See however Jhering, l.c. particularly n. 219 on

The view accepted by Virgil of the different characteristics of the first two tribes is probably expressed in the words Curibusque severis Aen. 8. 638, on which Servius adds the note "Sabinorum mores populum Romanum secutum Cato dicit." What seems to be intended is rather stricter discipline than higher social development; but Horace uses the same adjective, in a very noble passage (Odd. 3. 6. 39, 40), of Sabine domestic order. Although Tibur is some distance from the site of Cures, as shewn in the maps, I should like to quote here another note of Servius, or rather a Scholium Danielis on Aen. 1. 17, as bearing on the warlike character attributed to the Sabines and their patron goddess. "Habere enim Junonem currus certum est. Sic autem esse etiam in sacris Tiburtibas constat, ubi sic precatur, Juno Curitis tuo curru clipeoque tuere meos curiae vernulas sanos." The substitution of the last word for sane is due to Preller, Röm. Myth. p. 248. See Festus, P. p. 49, Curitim.

results may be questioned on the score of inherent improbability—I would instance, however, the Danish partial occupation of Saxon England as proof that the forcible irruption of a ruder body is not incompatible with the subsistence of a previous more civilised element, with a considerable taking into partnership of the conquered by the conquerors, and even with an adoption, in great measure, of the customary law of the former by the latter.

I dare not suggest such a rewriting of tradition as to suppose a Sabine conquest of Latins: but I think that the obscure legend of the first four kings points to a union of variable equilibrium from the first, varied by occasional outbreaks of something like civil war, which seem to have ended, in the Regal period, with the intervention of a foreign auxiliary, and to have been revived, after an interval of military Monarchy, in the Republic. The view, however, briefly hinted at here, and below, p. 237, will be more fully developed in the section on Patricians and Plebeians. At present I must return to more orthodox archaeological records of the first union of two tribes.

Quirites and Quirinus. The joint people of Rome, in Republican times and most probably before also, were called individually Quirites. Thus we find, in the Censor's formbook, populus Romanus Quiritium²⁰, and, in the old funeral proclamation, ollus Quiris leto datus²¹. On the authority of a few variants from the former phrase, e.g. populus Romanus et Quirites Liv. 8. 6, &c., the two have been sometimes classed as separate elements, and the Quirites made out to be citizens of Cures, a chief town of the Sabines²². But such a disparate classification, of a body on the one side and individuals on the other, seems unlikely, and this town of

²⁰ Varro, L. L. 6, § 86.

²² id. P. p. 67, Dici; p. 49, Curis.

²¹ Festus, F. p. 254, Quirites.

Cures is generally believed to be a pure fabrication ²³. I am therefore disposed, even against the authority of Corssen ²⁴, to accept the derivation favoured by Jhering ²⁵ and Mommsen ²⁶ from curis, Sabine for a spear or lance ²⁷, and hold that the Quirites are the individual warriors constituting the collective spear-bearing people ²⁸ of the old Salian hymns. On this view Quirinus, the deified alias of Romulus ²⁹, but no doubt a much older name—the latter being probably an invention of the earlier Roman literary period—is a tutelary god or hero of the united people, and the jus Quiritium its earliest customary law—law general, not at all necessarily private law in particular ²⁰. There are well-known parallels to this case of a tribe or nation being known to its neighbours, or calling itself, by a name derived from its armature ³¹.

Early period and third tribe. I have ventured to suggest, for the earliest beginning of Rome, a union, succeeding a struggle, of two tribes, with slightly different states of social development, mutually reacting upon one another but tending, from time to time, to split into two factions or orders. I hesitate to identify, as I understand Puchta to

²³ See Dionysius below, p. 240, n. 43. For the very old prayer to Juno Curitis preserved by Servius see n. 19.

²⁴ Corssen², ii. pp. 357, 358.

²⁵ Jhering⁵, i. p. 251: see however id p. 116, n. 25.

²⁶ Msr. 2 iii. p. 5, nn. 1 and 2.

²⁷ Festus, P. p. 49, Curis: Macrobius, 1. 9: on the "lance and targe" of the earlier Romans, see § 16, p. 494.

²⁸ Festus, F. p. 205, *Pilumnoe poploe*. Müller questions this old genitive form, which is however accepted by Corssen, i. p. 707; ii. p. 173. See also Msr. iii. p. 6, n. 2.

²⁹ Ovid, Fasti, 2. 476-480.

³⁰ As Puchta, Institt. §§ 28, 38, &c. following Göttling. See Seeley on Livy², i. pp. 72, 73. On the relation of the later "Civitas Romana" to jus Quiritium Ulpian, 3. 1, 2: on the replacement of the individual Quiris by civis Msr. iii. p. 7 and n. 2.

³¹ App. p. 254.

do, the growth of their different usages with the later Roman distinction of Public and Private Law. But I think it extremely probable that the four legendary kings, Romulus, Numa, Tullus and Ancus, may vaguely represent alternate predominance by the one or the other of the racial elements which are the most probable origin of the Orders. The strife between these seems to have been temporarily settled by the calling in of a third element, apparently in aid of the popular against the aristocratic faction, which ends by establishing a tyranny over both, and is only overthrown by their brief re-union; no small number however of Etrurians being still left in Rome, as a record or vestige of the former domination of the Etrurian dynasty. Finally this temporary re-union of the original warring elements is replaced by a long supremacy of the aristocratic party: the gradual equalisation of the orders being the subject of the ten earlier books of Livy.

In all this, there will undoubtedly seem to many too much reasoning upon prehistoric matters, as if certain and ascertained, so soon as they are worked, by some ingenious modern, into a theory. I can only say that this method seems to me preferable to that of laying such overpowering stress upon individual contradictions as precludes the attempt to weave any points of general legendary agreement into suggestions of probably real fact: points, I mean, which do not rely upon obvious imitation of foreign story, or pure heraldic invention; and facts which are really of some importance as the forerunners or foundations of known historical usage. The learned modern author, to whom I have often had occasion to refer as so hopelessly destructive a critic, Professor Pais, has however the merit of arranging, under heads, a most valuable collection which he has made of prehistoric material: a collection wherefrom I shall now proceed to avail myself of what seems to me a very interesting piece of evidence.

Its racial character. I assume, in accordance, I think, with all but a very few modern authorities, a close connexion of the third Romulian tribe, the Luceres, with the Etruscan nation. There is, as we have seen (n. 11) some variance both between ancients and moderns as to the origin of the tribes' nomenclature; but I may note that one of the former quotes Tuscan writers as claiming all three names for Tuscan. It is not impossible that we may recognise in this view some tradition of reorganisation by Tuscan authority (see below, p. 248). At present, I confine myself to assuming a general connexion of the Luceres with Etruria, and Etruria as the home of a historical family of Tarquins.

Tomb at Vulci. There was³² a remarkable tomb at Vulci, not far from Tarquinii (Corneto), which was discovered in 1857. The frescoes therein, to which I am about to refer, would apparently, to judge from their Graeco Etruscan style and subjects, date from not earlier than 400 B.C.³³ while they may be as late as 150. But they clearly represent old Etruscan legend, of early Etruscan greatness.

A scene of Greek story with which they are apparently connected—the death struggle of Eteocles and Polynices—might perhaps be considered to indicate some internecine struggle on a nearer scene. But I do not think this argument can be relied on for much, considering the everlasting recurrence of this particular tableau in Etruscan Museums—that for instance of Perugia³⁴. Etruscan taste seems to have

³² The frescoes hereafter described are now at Rome in the Kircherian Museum, according to Dennis (Cities and Cemeteries (1878), ii. p. 503). As my own visit, to that Museum, had quite another object (the acs rude), I am sorry not to have any personal recollection of these frescoes, for the description of which I rely on the 7th chapter of Pais' Ancient Legends, and a page of Dennis (ii. p. 506).

³³ See Dennis, i. 381. Pais, according to his usual practice, would rather put them in the 3rd than in the 4th century B.C., Anc. Leg. p. 132.

³⁴ A great many, perhaps the majority, too of the sepulchral cists bearing this subject are certainly late.

varied like that of our own early Georgian ancestors between the coarsely jovial and the brutal or bloody.

In the specifically Etruscan subjects, however, referred to above, our attention is at once riveted by a warrior named *Macstrna*, who carries us back to the Servius Tullius of the Emperor Claudius' speech³⁵—in his native tongue Mastarna—the friend of Caelius Vibenna, and the subsequent occupant of the kingdom "summa cum reipublicae utilitate."

Here he is freeing Caelius Vibenna (Caili Vipinas) from chains, while, in another scene, an unidentifiable Venthi Cailis is slain by Aulus Vibenna (Auli Vipinas) and a Cnaeve Tarchu Rumach, made out generally to be a Cnaeus Tarquinius of Rome is attacked by a certain Marce Camitlnas. Whether the latter has anything to do with the highly mythical M. Furius Camillus, the recoverer and second founder of Rome³⁶, may be questioned³⁷.

Caelius and Aulus Vibenna. In trying to make out some core of fact within these pictorial legends, we have also to take into account Varro's story of the Etrurian general Caelius Vibennus coming to the aid of Romulus against Tatius the Sabine king, with his followers, who are, after his own death, partly brought down to the Tuscus Vicus, partly left on that spur of their original hill position called the little Caelian³⁸. Also, the note of Verrius Flaccus who doubts whether to accept the more general view of the Tuscus Vicus being named from the Etrurians left by king Porsena, or from the Caeles and Vibenna, two brothers from Volci who were brought to Rome by King Tarquin as his main supporters and lived there³⁹.

³⁵ Tacitus, Annals, 11. 24 and excursus ii. in Orelli (Ed. 1846), i. 363.

³⁶ See Livy, 5. 49. Conditor alter urbis.

See the accounts in Anc. Leg. pp. 128, 129: Dennis (1878), ii. pp. 94, 95, 506.
 Varro, L. L. 5. 46.

³⁹ Festus, F. p. 355, Tuscum Vicum. The filling up of the lacuna in the MS. [Volci]entes is due to Müller. Paulus (Diaconus) naturally adopts

In Tacitus' account of a fire on the Caelian hill40 he derives the name from Caeles Vibenna, to whom as the leader of an Etruscan auxiliary force, this position is given by Tarquinius Priscus "or some other of the kings, for writers differ." Not much is to be made of a mirror from Volsinii, representing the brothers Aulus and Caelius Vibenna assailing the Latin Cacus 41, except to establish the family as Etruscan heroes, always connected with some special attack on Rome. The stories of Livy and Dionysius about the Tuscus Vicus42 are merely versions of the end of the Etruscan domination (which anyhow undoubtedly occurred very early in Roman history) contrived to suit the Roman vanity of later days. The latter historiographer, however, has the legend of a Caelius from Tyrrhenia (Etruria) aiding Romulus in his war against Tatius, king of the Curites (from their chief town Cures), and his Sabines43. Out of the strange, rambling and inconsistent story of Lucumo, or Lucius Tarquinius, beyond the incoming of an Etruscan contingent, I must confess that I can read little but pure romance.

Romance or the copying of Greek stories, and the anticipation of later Latin battles, perhaps equally mythical, is almost all that Pais admits as the result of the first part of his investigation into the accounts of Servius Tullius⁴⁴. The reform of the Roman Polity connected with that name, will be considered hereafter, as well as a great invasion of the Sabines, towards the middle of the 5th century, which Pais

the more popular theory, p. 354. Of course, in both, Porsena's action is reported as a retreat or raising of the siege of Rome.

⁴⁰ Tacitus, Ann. 4. 64.

⁴¹ Pais, Anc. Leg. p. 132.

⁴² Livy, 2. 13, 14: Dionysius, 5. 35, 36.

⁴³ Dionysius, 2. 36. See Varro cited in n. 38. The wild surmise of Valerius Antias about Romulus' *Celeres* being called from a commander of that name, in the same chapter of Dionysius, is surely not worth the notice of it, however slight, taken by Pais, Anc. Leg. p. 130.

⁴⁴ See Livy, 1. 34-36: Dionysius, 3. 46-48.

concedes as historic, connecting it with the arrival of Appius Claudius and the pretended victories over "the Sabines" 45.

I must leave it to those who will take the trouble of comparing his undoubtedly able treatment of the whole subject, with the original authorities, to decide whether this destructive treatment is the more satisfactory alternative, or an attempt to read, into the early "history" of Rome, some such general sketch as I have ventured to give on pp. 235—237, see also below, p. 247. I may add that the admission of Pais, last referred to above, is not by any means irreconcileable with a restoration of the Sabine aristocratic predominance (see p. 237), coincident with the arrival of a great Sabine gens.

Tarquins Etruscan. There seems certainly no reasonable question that the powerful dynasty, whose arrogance and tyranny resulted in the fall of royalty at Rome, was Etruscan in its family name, its reputed place of origin, its actual place of exile, and in the alliance which all but succeeded in replacing it⁴⁶. Nor is it any real objection, to the temporary predominance of a third race, that we find its representatives (if that view be correct), the patres minorum gentium (above, p. 232), occupying, possibly on their original co-optation, certainly on the expulsion of their royal dynasty, a position which recorded their juniority, and may naturally have once involved some lower grade of dignity⁴⁷. See however, § 8, p. 291.

The Etruscans. Two things remain to be considered before we come to speak of the united *populus* of three tribes—the ethnic character of the Romulian third, and the

⁴⁵ Anc. Leg. pp. 129-135.

⁴⁶ See generally the long chapters of Dennis, Cities &c. (1878), vol. i, on Corneto (Tarquinii), and Cervetri (Caere), in which all the ancient authorities are most fully quoted.

⁴⁷ See Daremberg et Saglio, s.v. Gens.

question how near one of these particular bodies severally approximates to the idea of a State proper.

I have assumed that we may take the third tribe, which finally succeeded in raising its chieftain to the throne of the triple community, to be Etruscan. There is, as yet, no general agreement as to the racial origin of that mysterious people, whom we have to do with principally as the neighbours of Rome on the North side of the Tiber: but, on the whole, the tendency is to believe them non-Aryan or at least largely pervaded by a non-Arvan element, possibly The same line of argument as has been referred to above (pp. 233, 234), in regard to the Latin and the Sabine element, has been carried further48, to the recognition of an Etruscan influence in a stricter regard shewn to ceremonials and words of style. For myself I should be rather disposed to trace this influence in a general strengthening of discipline and order, with the accompaniment of severe afflictive penalties, resulting from the reorganisation of the joint nationality on a more definite military basis than the rude marshalling of the first Tribe: which reorganisation, though it did not, at once, succeed, either in the earlier (Tarquinian) or later (Servian) treatment, in harmonising the former jarring elements, ended finally in welding them into that irresistible power which conquered the world.

Populus and Tribus. The ultimate consolidation of the three tribes into one whole, retaining many features of its original constituent parts, particularly those of the first, falls to be considered more in detail under the heads of pontifex and rex; because, although the reorganisation, which I must assume, appears almost necessarily to have been the act of a true Sovereign, Sovereignty itself is, in my view of the Roman Royalty, a gradual development through the judicial function, but principally under religious influences.

⁴⁸ Muirhead2, pp. 4, 5. See Professor Goudy's valuable note 4.

For contrast with a different case in our own history see below (p. 251); for comparison with pre-Hellenic Greece, § 9, App. pp. 335, 338.

Pilumnoe poploe. The word populus itself, though evidently an old one⁴⁹, gives us little specific information. Its early designation as the spear-bearing, which somewhat corresponds to the testamentary classis procincta (see below, § 14, p. 445; § 16, p. 496), in connexion with the word populari and the title magister populi given to the occasional resumption of the military tribal chieftainship, in the Dictator, may be urged in support of the view which Mommsen once held in regarding the populus as the Armed Host, or the Ravagers⁵⁰. But both this explanation and Jhering's, that populus means the young part of the community, appear very much less probable than the derivational meaning of the word, supported as it is by parallels in other Aryan languages, simply as that of multitude⁵¹.

Tribus. Considering the Tribe, for a while, not as combining, or combined, to form a *populus*, but as an independent entity, I must now return to the enquiry suggested at the end of Section 5.

Have we, in the Romulian tribe, arrived, as the culminating point of successive aggregations, at the model or embryo of the Roman State. I venture here, as will have been seen, to differ from my master, Maine, as well as from another authority, for whom I feel an almost equal respect.

In one of his most pregnant suggestions, Jhering discerns, among the old Romans and Germans, a military Constitution

⁴⁹ This seems indicated in the form *pilumnoe poploe* (above, p. 236, n. 28), of the Salian hymns, with its very ancient genitive form (Corssen², i. pp. 528, 706, 707).

⁵⁰ Hist. (Dickson, 1901), i. p. 90. Jhering⁵, i. p. 249, n. 147. See however, for Mommsen's later view Msr.³ iii. p. 3, n. 2 and further below in § 7.

⁵¹ Curtius⁵, p. 277 comparing πληθοs, plebes, folc, &c. For the specialised use of plebes see below, § 7, p. 260.

making its appearance together with the gentile one, and the former ultimately supplanting the patriarchal State⁵². If I may venture to translate or interpret this by my own views and words, I rather believe in an original patriarchal condition (not "State" = Polity), on which a military order has been temporarily imposed, with the result, very probably, of stiffening the parental power, but not amounting to anything in the character of an inchoate Constitution. That appears to have been a matter of subsequent and gradual formation, mainly, at least in Rome, under the influence of religion.

Early recurring numbers. As to this last agglutinative element, I do not as yet venture to lay down any general theory. On the preceding condition suggested, there is a distinct bearing, as it seems to me, in the remarkable traditional recurrence of certain pervading numbers, which exist in other cases than those of the two races to which Jhering specially refers (see § 1, pp. 14, 15), and which may conceivably have some connexion with circumstances uralt, to use his favourite expression, of Indo-European migration⁵³.

Here, however, I must return to my own attempt to solve some of the difficulties which face one not less in the earlier theories of Niebuhr and Ihne, than in those of Maine and Bachofen, relating particularly to Rome. What I wish, at present, to insist on, is that—while the fundamental unit of the Roman Polity is the Family, and the first directly constituent parts of it are either combinations, real or assumed, of the Family, or combinations of those combinations—we also find, in its earliest history, unmistakeable traces of occupation by a Host, in rude military order. Some

 $^{^{52}}$ Geist⁵, i. p. 182. I cannot avoid the inherent ambiguity of the word $\mathit{Staat}.$

⁵³ See generally the most interesting work, which Jhering unhappily did not live to submit to final revision, the Vorgeschichte der Indo-Europäer (transl. Drucker).

of my grounds for this statement will be found in § 5, pp. 169, 170; others are added in § 12.

Tribunus must, on all philological analogy, have originally meant the headman or Chief of a Tribe, whatever Tribe meant ⁵⁴. I have to shew, in the section last referred to above, that we have scattered data enough to justify us in suggesting that the original tribunus was the chief of the original Romulian tribus, as a Host or martial clan. This is not yet the populus of Rome: but to this source I incline to trace the decimal arrangements in the Roman polity, which might fairly arise from the natural and obvious marshalling of a Host. The ternary ones I believe to come from the association of the three Roman tribal elements into one polity, and the combination of the two to be due to a revision or reconstruction of that polity under the proper or complete Sovereignty, the formation of which is described in §§ 11—15.

Results or postulates. In this necessarily hypothetical view taken of the prehistoric facts which may underlie the Romulian legend, there are certain postulates to which I must draw attention. I have assumed the overrunning of a comparatively peaceful previous settlement, which we will call Sabine, by a Host of rude warriors, to be connected with the so-called Ramnes, the formation of a joint nationality on the very rough terms which are prefigured by the Rape of the Sabine women, and the gradual crystallisation of these more or less well-assorted atoms into two political bodies generally at variance, if not at something like war with one another. But this general difference is difficult to reconcile with the growth of gentes, which, it has been suggested, may spring from isolated settlements of the smaller divisions of a Host—the $\delta \epsilon \kappa \acute{a} \delta \epsilon \varsigma$ of Dionysius—in which the assumption of

⁵⁴ See inter alia Roby, Grammar, i. pp. 308, 309 and cf. Portunus from portus Cicero, de Nat. D. 2. 26. 66.

relationship, perhaps vaguely recognised in the whole tribe (above, p. 230), was strengthened by the adoption, in each particular case, of a special cult⁵⁵. Undoubtedly, however, the growth of the *gentes* ought to be connected with the more developed and ceremonial, not with the ruder, element (see above, p. 234). This is a difficulty which I cannot deny: but I would call attention to the fact that, as between the first two tribes, it is to the Tities or Sabine element that predominance is, as Mommsen shews, to be given^{55a}.

The origin of the Plebeians, and their coexistence from the outset with the Patricians will be considered more fully hereafter⁵⁶. I may anticipate so far as to say that, as to that coexistence, I thoroughly agree with Mommsen, but must venture to question the part he gives to the Plebeians in the Curiate Constitution, which must of course be admitted to have preceded the Servian reform. This subject again I must leave to be dealt with under the head of curiata comitia. At present I confine myself to the invasion of the first tribe. as leaving two particular results of its existence: one, the possible origin of the gentes, in the smaller bands of which the invading Host was composed: two, the survival, at any rate in memory and availability for future uses, of the larger division, which appears to me obvious and natural in itself, and to which we have an undoubted parallel in the old German and English hundred 57.

To the union of the three tribes must, of course, be referred such institutions as the Sex Suffragia, designating an arrangement of the Roman Knights of which Cicero speaks as existing in his time⁵⁸; the Sex Vestae Sacerdotes⁵⁹ expressly connected with a duplication of the Titienses, Ramnes and

⁵⁵ See § 5, p. 139.

⁵⁵а Арр. р. 252.

^{56 § 7. 57} App. IV to § 5.

⁵⁸ Cicero, de Rep. 2. 22. 39: see Festus, F. p. 334, Sex Suffragia, and the exhaustive notes in Msr. ⁵ iii. p. 107.

⁵⁹ Festus F. p. 344, s.v.

Luceres; the three principal Flamens⁶⁰, and the three original Augurs⁶¹. The accounts of the original constitution of the Senate are so conflicting and unintelligible that I must defer their consideration to the special treatment of that body (see § 8 particularly pp. 287, 288). It will have been observed that, in many of the passages just cited, results surviving to quite late times are to be considered, which have no very obvious connexion with the Servian Constitution, but which on the whole survive through the Republic. They are, to my mind, clear indications of a pre-Servian revision, which I venture to place under a king of the final Etruscan dynasty. Some such treatment alone can account for the regularity of the assortment into multiples of three, in the case of associations which, in themselves, have every appearance rather of self-formation or growth. We can conceive, as not impossible, the formation of a gens around, or out of, an original Army division of ten warriors: as quite possible the association of neighbouring gentes into a curia (see § 9, p. 309): but the assortment of so many gentes to a particular curia, and so many curiae to a Tribe, seems to require the first draft of an artificial constitution, which is much more credible than the gratuitous subdivision ab initio referred to in § 1, p. 12 and § 9, p. 307.

An assumption of such a revision or reclassification seems to me to be virtually made by all who accept the fact and general character of a "Servian" reform, which necessarily implies a previous state of things preeminently aristocratic, as based upon a gentile principle which, as we are told, was of a remarkably symmetrical form. In the general view of the situation we can all believe without difficulty: it is to the cut and dried original constitution, attributed too to an obviously fabulous founder, that I must demur. On the other hand it is quite conceivable that it should be the work

⁶⁰ Gaius, 1. 112. 61 Msr 3 iii. 110, n. 1, and ll. cc.

of a real person invested with the wide general power which we know as Sovereignty. The probable growth of this power at Rome forms the subject of §§ 11-15. Into the question of this pre-Servian reformer's personality we have not enough evidence to enter with any prospect of attaining a certain result. I am myself inclined to attribute the first draft (Curiate) of the Roman Constitution and the closure of the Circle of Patrician gentes (which continued, with one exception, throughout the Republic) to the first king of the Tarquinian dynasty, if this were not, as he probably was, the first king at all, of the Roman populus. The combination, with the tribal three, of that factor, ten, which bears so large a part in the Romulian tradition⁶² is to be regarded as the survival of an intrinsically probable division of an invading Host. To this reference has been repeatedly made. If originally a fact, its recurrence is most naturally accounted for in a revised constitution which, though ultimately based on a religious principle, does not lose sight of a primary military organisation, the reintroduction whereof also forms the more prominent feature of the later Servian system.

The ten witnesses of the confarreatio, which I agree with Mommsen in regarding as probably the oldest among the formalities mentioned in our legal traditions, may be a result of the assortment of ten curiae to a Tribe, but that assortment, and the ten witnesses themselves, seem quite as probably to be derived from the remote origin of the gens, as a decas⁶³. The latter conclusion indeed would appear to be the more in accordance with the view by Mommsen and Jhering of enuptio⁶⁴.

The Senatorial decuria is, among the many instances of this recurring numeral ten, an argument in favour of some early revision of constitutional arrangements. Historically

⁶² See e.g. Festus, F. p. 355, Turma.

⁶³ Above, § 5, p. 169. The passage of Mommsen referred to is Hist. (Dickson, 1901), i. 5, p. 85 n.

^{64 § 5,} pp. 150, 151.

it appears as a panel or division of judices⁶⁵, who were, according to traditions of legal practice, first appointed out of the Senate. The word has, in itself, nothing to do with curia: it meant originally a body of ten men, as centuria meant a number of a hundred men⁶⁶. The actual number, in this Senatorial decuria, afterwards varied, as the total number of the senate itself varied from the original hundred, to which subject I shall return in § 8. At present I have only to note that the ten men of the original decuria imply the recognition of ten divisions or groupings of the curiae, which were certainly represented in the Senate: i.e. they suggest unmistakeably that artificial revision for which I have been contending: for the curia in itself, is presumably, like the gens, a natural growth, not tied to a fixed number, but one which might be more or less, for the individual tribe.

The decuriae however of the Senate are traditionally more connected, in the first instance, with the constitutional stopgap called an interregnum. This subject will be treated more in detail under the head of senatus, to which it more properly belongs; since the slight evidence available, as to its survival in historical times, throws little light, if any, on the prehistoric division, or rather grouping, with which I am at present concerned.

The whole Romulian Constitution, with its symmetrical compounds of 3 and 10, is, according to the view here taken, strong evidence of an authoritative revision. The strength of this evidence lies, of course, not so much in the neat systems of early so-called constitutional writers and historians, as in the survivals of actual practice, with one more of which I will conclude this argument. As late as Cicero's time we find the thirty lictors still representing the thirty curiae of the old populus⁶⁷.

⁶⁵ Cic. Verr. 2. 2. 32. 79. decuriam senatoriam. 66 Msr. 3 iii. 104, n. 1.

⁶⁷ Cicero, de l. agr. 2. 12. 31. Sint igitur decemviri neque veris

Conclusion. The assumption made, in the latter part of this section, that the traditionary Romulian subdivisions are due to the revision of a previous less symmetrical system, appears to me decidedly preferable either to the modern view of associations voluntarily, or involuntarily, forming themselves, like chemical "equivalents," in fixed numbers; or to the former somewhat childish belief in an extraordinarily prescient and self-denying lawgiver of obviously fabulous name. On the former of these two views also, if adopted in the order suggested by Maine—the Tribe coming last—it is not very easy to understand why the idea of relationship, so prominent in the theory of the gens, should practically disappear in the Roman curia68 to reappear again as it does according to one etymology (above, p. 230) in the name of the Roman tribe: which is one reason why I am inclined to agree with M'Lennan as to the priority of the Tribe, but to differ from him as to its individual constituents (above, § 2, p. 26).

Three Deities. The assignment of particular Deities to the three tribal constituents of the ultimate Roman populus is a theory which has had a considerable attraction for modern writers—Jupiter to the Ramnes, Juno to the Quirites or Tities, Minerva to the Luceres. Upon the application of the term Quirites to the individual members of the whole People I have spoken above (pp. 235, 236). Juno is certainly connected especially with the Sabine element, by reasoning depending, to some extent, upon a pretty certain emendation of Festus⁶⁹. Minerva is also considered, with

comitiis, hoc est populi suffragiis, neque illis ad speciem et usurpationem vetustatis per XXX lictores auspiciorum causa adumbratis, constituti. The passage of Festus, F. p. 351. [Triginta lictoribus l]ex, of which the beginning is an almost certain emendation, shews when this representation was first allowed (214 B.C.). Livy, however (24. 8, 9), gives a slightly different account.

⁶⁸ See § 9, pp. 307, 311: but the unquestioned character of the Greek φρατρία, in the other direction, must of course be taken into account.

⁶⁹ Qui[ritis Juno dea Sabinorum] &c. Festus, F. p. 254 and P. p. 49. See also above, n. 19.

some reason, to be a Deity of Etruscan origin⁷⁰. The Capitoline trio (Livy, 6. 16) is apparently regarded by Dionysius (4. 59), as made up by Tarquinius Superbus, and its third member (eo nomine), together with the two Deities corresponding to the Roman Jupiter and Juno, were, according to reported Etruscan usage, tutelary to all rightly constituted Etruscan cities⁷¹. But the evidence on this subject legendary or antiquarian is not sufficiently definite or consistent to found upon it any decided constitutional inference.

The Roman populus and the Anglo-Saxon kingdom. In the union of the three tribal elements here understood to have taken place at Rome, there is too much of what is special or peculiar to warrant us in looking for parallels elsewhere, e.g. in the Anglo-Saxon early kingdoms.

The first Romulian tribe, with its military organisation, its conceivable tribunus, and its probable council of elders, can be fairly well compared with the various invading Hosts of Britain under their heretogan and ealdormen⁷²: but the peculiar intermediate coagulation; under religious impulse, which we cannot but perceive at Rome, has left little or no clear trace in England. The hundreds and tens are reproduced, the former as territorial divisions, the latter probably as developed ultimately into townships; but the Host, as a whole, seems to pass directly into a loosely compacted kingdom, rice⁷³. On the comparative absence, in early England, of a religious uniting principle see the remarks of Miss Phillpotts cited in § 4, App. p. 134.

⁷⁰ See Dennis, Cities &c. (1878) i. p. lv.

⁷¹ Servius ad Aen. 1. 422; 3. 134: Macrobius, Satt. 3. 4. 8.

⁷² Anglo-Saxon Chronicle, i. pp. 21, 24. Cf. Stubbs⁶, i. p. 126 and Edm. 2. 7.

⁷³ A.S. Chron. (Rolls Series) i. p. 26. Here the cyne-bearn of C.C.C.C. and Bodl. Laud is translated by Thorpe "Royal offspring." Such compounds are derived by Schmid (see too Kemble, i. p. 153 and Liebermann, s.v Königstitel) not from cyn but from cyne (nobilis, rex) as also cyn-ing itself. For a different view of such compounds see Freeman, Norm. Conq. i. p. 78 and my note on tribunus, § 12, pp. 402 sqq.

APPENDIX TO § 6

RAMNES &c. compared with other tribal or national names, p. 252. Ramnes, Tities, Luceres, ib. As yet no territoriality, 254. Colour, speech or armature, ib. Territoriality and topography, ib.

Resemblance to Dorian rather than to Ionian tribes. The names of the three Romulian tribes resemble rather the three Dorian than the four Ionian, in the fact that while the latter had become practically denominative of mere political distinctions, these appear to have retained, like two at least of the former, some special signification of their own, which has not yet been satisfactorily made out. In the hope of attaining some more definite result, which might possibly throw light on the early history of Rome, it may be worth while to compare these words with a few other tribal or national names.

Ramnes, Tities, Luceres. The possibility of Ramnes meaning Foresters or Bushmen which is tentatively put forward in Mommsen's History (i. p. 44 tr.), is apparently abandoned in his later Staatsrecht, nor can I find any explanation of the names of the "three patrician tribes" expressly adopted by him in the principal passage relating to them; in which I wish, however, to call particular attention to the following fact. Mommsen, building on traditions of the annexation of Alba, and the historical retention of Sabine sacra in connexion with the Sodales Titii concludes that, of the triple confederacy, not the Ramnes, as one might expect, but the Tities are to be considered the chief or principal element. This view,

⁷³⁸ Msr.³ iii. p. 97, n. 3. Cf. Tacitus, Ann. 1. 54 with Varro, L. L. 5. 85.

coupled with the explanation of the names suggested by Corssen (§ 6, n. 11) is at any rate not irreconcileable with the theory which has been more than once suggested above—a rough marauding body, to a considerable extent absorbed and transformed by another, of a higher moral and social development, over which it has, to begin with, obtained a military supremacy.

Ramnes which Corssen regards as a word of quite distinct origin from Rome⁷⁴ is as we have seen taken by him to come from Rap-nes, as somnus from sop-nus, and primâ facie to mean, in accordance with the old story the Robbers or rather the Ravishers^{74a}. On second thoughts, however, he is disposed, "from the unhistorical character of the legends" (!), to prefer the more complimentary explanation of Rap-idi, the Swift-Riders, while Tities are the Honoured or Honourable, and Luceres the Shining ones (compare the $\Gamma \epsilon \lambda \acute{\epsilon}o\nu\tau\epsilon\varsigma$, § 9, App. pp. 336, 337).

Of the Luceres I have ventured to adopt a different view (above, pp. 236, 238) preferring to connect the word with the root of a designation proper to a King or Prince of Etruria⁷⁵, though I cannot derive it from the full style of *Lucumo*. With regard to the other two tribes, although Corssen's explanation cannot be regarded as absolutely convincing, I am inclined on the whole to agree with it, particularly as to the Ramnes, regarding this as one of the names given to a

⁷⁴ Rome he thinks is the Stream-town, i.² p. 364; ii. p. 1012.

^{74a} Corssen², ii. 85 n., cf. Beit. p. 465. Neither in Brugmann nor in Fick can I find any attempt at the derivation of these three puzzling names: that of Vaniček (pp. 154, 791, 819) is practically the same as Corssen's, which Mommsen would seem ultimately to favour.

⁷⁵ See Servius, ad Aen. 10. 202 as to the 12 Lucumones. Tities also, as the Honoured, though suspiciously like a "popular" derivation from the Greek, has the support of Mommsen's conclusion stated above (p. 234). Of course it is open to those who disregard tradition altogether to make out the Sabines as the true conquerors: but I doubt if even Pais would go so far as this.

people or clan lacking as yet the modern States requisite of definite territoriality⁷⁶, i.e. still in the condition of a wandering Host, whose chief connecting link is War.

Colour, speech or armature. On this stage of existence, various external characteristics will give such a clan its name: colour, speech (see below) and prominently armature. Compare for instance Quirites (§ 6, p. 236) with Saxons, Lombards⁷⁷, &c. Such names may arise either from being given by outsiders or assumed by the people themselves. Being mostly, in early times, of a complimentary, or complacent, character, they seem more likely to belong to the latter class. Of a different character is the fairly wide-spread form of name, by which a nation designates itself as "the people" and others as stammerers, foreigners, outsiders, &c.78 These expressions would seem to assume rather more of the modern State's fixed territoriality, which assumption is evident in the later Latin form peregrinus⁷⁹. Names of purely topographical signification⁸⁰ have not really much to do with our present enquiry.

⁷⁶ Jurisprudence, i. p. 162.

⁷⁷ I adopt the popular derivation of this word, which is accepted by Littré, though contested by others. Add the Gar-danes and the Scyldings of Beowulf, and see generally, on names of conquering tribes, Taylor, Words and Places, pp. 48 sqq.

⁷⁸ I refer to such cases as βάρβαροι, Deutsch, Welsh, &c.; see Taylor, pp. 42—47, &c. Such styles as βωρεῖς and οἰνῶπες, the additional tribes of Cyzicus, have rather the look of depreciatory terms, as has apparently Πάμφυλοι (§ 9, App. p. 335, n. 104).

⁷⁹ The man of another land, cf. perduellis and see E. R. L. p. 72.

⁸⁰ Such as Μεσσάπιοι and 'Ηλεῖοι (Vallenses), Curtius⁵, pp. 360, 469: Apuli (Wasseranwohner), Corssen², ii. p. 170, perhaps 'Αχαιοί. To this, which is probably the largest class of national or tribal names, belong our English ones compounded with saetan, such as Scrobsaeta &c.

§ 7. PATRICIANS AND PLEBEIANS

Special grounds for this distinction at Rome, p. 255. Elsewhere, 256. Gilds, 257. The division original at Rome, ib. Patricii and Patres, 258; Qui patrem ciere possent, 259. Conscripti distinguished from patricii minorum gentium, ib. Plebeii, plebes, populus, 260. Plebeii as Clientes, 261; προστάτης and πελάτης, ib. Patronus, murder of, treason, 262. Clientela, Mommsen's applicatio, 263. Later optional patronus, 264. Jhering on precarium and peculium, 265. Plebeii as members of conquered populations, 266. Mommsen and Soltau, 267. Plebeian gentes, 268; Doublets of patrician, ib. Other cases: quasi-gentile organisation, stirps, 269. Maine's Indian analogies, ib. Old plebeian marriage, 270; after lex Canulcia, 272. Connexion of certain plebeian gentes with sacra, Conclusion, 273. Public and Private Law as patrician or plebeian, ib. Muirhead and Moyle, 274. Jhering, 276. Connexion of Patricians and Plebeians with Senate and curia, 278. Patrician monopoly of office and land, ib.

A difference of race, or at least of cultural development in two cognate races, has been hypothetically suggested above (§ 6, p. 233) as a special cause, at Rome, for the important distinction of Order, which was, in a greater or less degree, common among the Aryan nations of the West. There are many points also, in which this distinction, as obtaining in the particular Polity under our consideration, appears to be illustrated by the phaenomena of Indian Village Communities as observed and recorded by Maine. Such coincidences will be noted from time to time in the present section and elsewhere: but the temptation to assume any systematic parallelism in the nascent Roman State either with Indian or nearer origins has proved in my judgement

somewhat unsatisfactory. There are other special causes to be taken into account for Rome, such as the extreme Roman development of potestas and manus with the result of the stringent canon of descent, consisting of agnatio strictly so called (§ 4, pp. 111, 114) the retention of sacra as the main connecting link of gentiles, the extremely probable closing of the circle of gentes, on the formation of the Curiate Constitution, &c.

The nobility of the Anglo-Saxons or their Teuton ancestors throws no particular light on the Roman Patriciate. The distinction of eorl and ceorl, etheling and friling is treated by Stubbs and Maitland as simple matter of descent, without any very assignable source as to whom the descent must be traced from.

If we may judge from stray words and antitheses in the earlier A.S. laws one would be disposed to think that the root of nobility was personal association with some military leader². Divine or semi-divine origin is usually claimed in the genealogy of any person of distinction: this I suppose may be attributed to the loyalty or interest of the scalds or bards with whom the foundations of history begin; and comparative degrees of remote ancestry may perhaps be inferred, but nothing can be relied on as approaching to evidence.

Among facts also, which must be taken into account, as generally bearing on this subject, are the undoubted tendency to associate in local organisations, or assemblages, with actual or presumed relationship, the degrees of which, however, were probably nowhere so strictly regarded and regulated as at Rome: on the other hand, the addition of new incomers, on the decrease in means and consequent

¹ See Stubbs, i. ch. 2, and P. and M., ch. 1 generally.

² See the distinction between gestocund and cierlise in Ina 54 compared with Ael. and Guth. 3, and the general meaning of pegen in Schmid, Gesetze, Gloss.

consideration, if not the actual dying out, of certain of the original families.

A particular developement, in towns, later than the original formation of religious gilds,—which may be directly compared with a notable feature in the Roman gentes (see § 5, App. III. p. 193) is, as we have seen, that of mercantile associations, of a somewhat similar character: these latter being again to be distinguished from the intermediate Frith Gilds, properly so-called. The last were artificial unions, springing up, or introduced from above (ib. pp. 195, 199 sqq.) to replace the original family compact, with its mutual protection and responsibility. The Gilds Merchant, on the other hand, would appear to arise as the natural result of a son's usually following his father's occupation and thus establishes de facto a hereditary transmission of freedom of the Gild, with the exclusion of others, and the gradual formation of a citizens' aristocracy. The minor or late division of Trades or Crafts' Gilds, and the fierce struggles of the latter against the so-called "patriciate" in the German and Belgian towns of the 13th and 14th centuries, is a matter of medieval history3, casting very little light, if any, upon the more simple points at issue between the Patricians and Plebeians of Rome.

Division, at Rome, original. This Roman division is undoubtedly regarded by the earliest Roman annalists as a fundamental and original one, dating from the fabulous times of Romulus. It exists von Haus aus in the view of Mommsen, to use that favourite expression of his⁴. If

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³ The reason why this particular struggle belongs to these foreign parts, and why England did not develope a similar burgess patriciate is perhaps to be found in the stronger executive which existed over the towns, under our Kings. See Brentano (§ iii. Introd. Essay in Toulmin Smith's English Gilds), and distinguish the case of Florence, with the *two* competing supreme powers Pope and Emperor. Compare generally Villari's History of Florence, ch. iv.

⁴ Forschungen, i. p. 78, n. 13; more in detail Msr.² iii. pp. 92-94.

I venture to suggest a later date (see below), it is rather as to matter of recognition and regulation than of origination.

This is a subject of much interest and importance to the legal historians, who still attach any credibilities to the early annals of Rome; as it was the reputed, and probable, cause of that early codification, which some of us believe to be a reality, and it undoubtedly led to the foundation of a separate constitutional organisation, to which most of the reform in Roman Private Law was due.

The individual steps by which the great offices of State were gradually thrown open to the "lower Order," and which form the main part of our internal history of Rome for the first 200 years of the Republic, may be questioned; but as to the general character of the struggle there can be no doubt: while, as late as the time of Cicero, and even of Gaius⁵, there are traces still surviving of the original patrician ascendancy and monopoly of high office.

Patricii and Patres. The name, by which we moderns generally designate the higher order in early Rome, is possibly not a very old word, although occurring in Plautus⁶. It has, of course, something of a patronymic form, and the patricii, in any strict (Republican) use of the word, were no doubt descended from members of the class called Patres in the Decemviral legislation?. That they were descendants of actual Senators selected by Romulus, as is somewhat

⁵ According to Gaius, i. 112, the post of a higher Flamen (Festus, P. p. 151, *Majores*) or *rex sacrorum* could only be held by a Patrician of the purest blood, sprung from, and participating in, the strictest form of ceremonial marriage.

⁶ Plautus, Captivi, 5. 4. 5.

⁷ The words of Livy, 4. 4, ne convibum patribus cum plebe esset, seem to come nearest to an actual quotation. Compare the more oratorical language of Cicero, de Rep. 2. 37. 63. Dionysius (10. 60), speaking of the same legislation, has πατρίκιοι.

doubtfully stated by Dionysius, and somewhat curtly by Livy8, is a matter which we need not pursue farther. absurd derivation qui patrem ciere possent, those who could claim a father, in the speech attributed by Livy to P. Decius Mus9, is only useful as bearing testimony to one view of plebeian marriage in the earliest times (§ 3, p. 70). give the true explanation of the word, in its original use, I am obliged slightly to anticipate my account of that Council of Elders (senatus) which was certainly a primeval institution at Rome. This was, in all probability, drawn in the first instance, from the heads of families (patres) belonging to gentes which formed the original Roman Polity: so that the whole body of full burghers, which was constituted by these gentes, came to be called patres. At any rate, all the old etymologies start with the reference to the Senate as technically the patres 10.

The question of the conscripti, so familiarly associated with patres, must stand over till we come to treat specifically of the early Republic: but one source of error, with regard to the origin of the Plebeians, may be cleared off here. Some have attempted to trace that origin to the gentes minores, of whom I shall speak hereafter. This idea is distinctly negatived by Cicero's statement that the Papirii were patricii minorum gentium, in an answer to a member of that gens itself¹¹.

8 Dionysius, 2. 8: Livy, 1. 8 ad finem.

⁹ Livy, 10. 8. Corssen², i. p. 53, shews that the termination is merely formative. The subsequent suggestion in Decius' speech, that this means nihil ultra quam ingenuos, is taken up later by Cincius (see Sources, p. 69), as quoted in Festus (F. p. 241, Patricios), in his book on the comitia (p. 270).

¹⁰ Msr. 3 iii. p. 13, n. 1.

¹¹ Cicero, ad Fam. 9. 21. 2. Sed...qui tibi venit in mentem negare Papirium quenquam nunquam nisi plebeium fuisse? Fuerunt enim patricii minorum gentium: quorum princeps L. Papirius Mugillanus, qui censor cum L. Sempronio Atratino fuit...annis post Romam conditam CCCXII. Sed tum Papisii dicebamini. I do not propose to follow up here the various historical points illustrated by this genealogy, but have set it out somewhat

Plebeii. It may be taken as fairly established that the first *nucleus* of the historical Roman Polity consisted of a circle of ascertained individual *gentes*, some of which were apparently a later addition to the original body.

At some very early period, but after this addition, the circle of gentes was closed, and all persons subsequently admitted into the community, or left outside at the time of such closure, were known simply as the multitude (plebes), the individuals as plebeii, occupying, according to Mommsen and others, a position of half-recognised citizenship, almost of half freedom. The name plebes has much the same derivational meaning with populus¹². Both may be explained as a numerical majority, in comparison with a smaller and more privileged body in the same community: further inferences from the two names, seem to me somewhat fanciful, or entirely mistaken¹³.

Inferiority and lack of organisation¹⁴ are results which

at length for the sake of the argument below in § 8, p. 291. The idea of Tacitus, Ann. 11. 25, that the patres minorum gentium were those summoned by Brutus, on the expulsion of the Kings, has, I believe, no other supporter. But see below (§ 8, p. 293) on conscripti.

¹² Curtius⁵, p. 277: Corssen², i. pp. 165, 442.

13 Populus is possibly the common people as opposed to the Council of Elders, which is everywhere a very early institution. The explanation of this word by Mommsen as the Armed Host has been referred to above (§ 6, p. 243). It was originally supported by a very doubtful etymology of the word populari=verheeren, to ravage a country through occupation with an army, which is connected again, rather doubtfully, with popa (Mommsen, Hist., Dickson, 1901, i. p. 90; Forsch. i. p. 168, n. 1; Sr.³ iii. p. 3, n. 2). Popa is more probably to be connected, through popina (for coquina), with πέπων, &c. (Curtius, p. 466: Corssen, i. p. 118), and Mommsen's explanation of populari is rightly rejected by Seeley (Livy², i. p. 131). A more probable derivation is given in Corssen, i. p. 524. For the various meanings of plebes and populus as opposed to senatus, see § 8, pp. 281, 282, and Msr. iii. p. 5, nn. 2, 3. For the rather uncommon expression populus plebesque, ib. p. 6, n. 4.

14 Pictet (Origines, ii. p. 390) makes plebes the multitude "par opposition aux classes supérieures." Karlowa calls them an "ungegliederte Menge"

(RRg. i. p. 63).

might naturally follow from any closure of a privileged class, in a community subject to an increasing influx of outsiders. (Compare the case of the Gilds Merchant and the Crafts Gilds above, p. 257.) This obvious law, however, of human nature, does not entirely solve the problem of the origin of the Roman plebs, as to which two slightly different answers have their powerful adherents, each being based on a certain amount of early history, or rather perhaps a speculative reading, by historiographers, of ancient practice and antiquarian research. The second of these is more a modification of the first, than an entirely different view (see below, p. 267).

1. Plebeii as clientes. According to Dionysius, the distinction of Patrician and Plebeian was an original one made by Romulus himself, i.e. existing from the beginning, of superiors and inferiors, in point of family and valour, coupled with some consideration of means. All office, sacred and secular, was given to the former class, while the latter were entrusted to their charge, as clients, each being allowed to select his own patron^{14a}. I employ the style of a relationship which was undoubtedly a historical fact in later times, although its attribution, in so wholesale an extent, to the earliest is most questionable. The patronus, as we know him in Augustan literature, is the supporter, in Court, or the Patron, in quite a recent sense, of his Clients or Hangers on. Both meanings, no doubt, are to be found as early as Plautus¹⁵.

προστάτης and πελάτης. This interpretation of patronus seems best to account for the word προστάτης which is the Greek equivalent adopted by Dionysius and Plutarch¹⁶.

¹⁴a Dionysius, 2. 9. 15 Menaechmei, 4. 2.

¹⁶ Dionysius, l.c.: Plutarch, Romulus, 13. The προστάτης was, as is well known, the fore-stander, i.e. the defender and representative, at Athens, of the resident alien, or foreign sojourner, μέτοικος.

It should be remembered that such Greek styles as this, not being mere transliterations, like so many forms in later Roman Law, e.g. Greek Versions of the Digest, nor literal translations, may really give us additional information of considerable value, either as to received Roman tradition or as to recognised analogy with Greek institutions.

The correlative $\pi \epsilon \lambda \acute{a} \tau \eta s$ would appear, at first sight, to imply local residence merely, of the *clientes* round their patronus, but had perhaps acquired rather the derived signification of suppliant¹⁷ which might fairly pass into that of retainer.

All this is reconcileable with the etymology usually accepted for *cliens*, i.e. the person obedient to command¹⁸. Such a semi-feudal position of the client does not appear, in that character, to have any counter-indication of *relationship* in the Patron: but the Roman word *patronus was* clearly considered as importing some idea of *paternal* protection (above, § 3, n. 19) which is much dwelt on by Roman laudatores temporis acti¹⁹.

Patronus. This semi-paternal relationship is, e.g., strongly put by Gellius, quoting in support the elder Cato²⁰. It is to be gathered, though not quite so clearly, from the passage of Dionysius quoted above, where, after enumerating the mutual obligations incumbent on Patron and Client, he goes on to describe the penalty attached to the breach of them, as liability to the law of treason, which Romulus passed, that a person convicted under it might be killed,

¹⁷ See the long note in Ruhnken's Timaeus, s.v. πελάτης.

¹⁸ Höriger in Curtius⁵, p. 151 (see Corssen², ii. p. 740: Jhering⁵, i. p. 236, n. 131, and Msr.³ iii. p. 63, n. 2, and compare oboediens, Corssen, i. p. 631). Clueo, in Latin, it is true, generally means simply "to be called"; but it is surely allowable to cite the Greek signification of κλύειν to hear, and attend.

¹⁹ Aristotle, Const. Ath. 2. 5, and Photius, s.v. π ελάται, make the position of π ελάτης more that of a serf.

²⁰ A. G. 5. 13. 4. See Karlowa, RRg. i. p. 38, and below, n. 25.

by any that would, as a sacrifice to the infernal Dis²¹. We cannot but remark the interesting analogy between the view here indicated and that taken by our own Common Law, that it is *petit treason*, i.e. an aggravated degree of murder, when the murderer owed some special private or domestic allegiance to the murdered²².

Clientela. The theory of Mommsen is that the plebs owed its origin and nucleus, directly and exclusively, to this half citizen, or half free, body of clients; to whom he, of course, denies the fundamental rights vaguely attributed to them by antiquity²³. We are therefore obliged to examine the facts from which he considers the original clientela to have arisen: bearing in mind his own admission (above, p. 257), and remembering that, as he also admits, all this is, in early Roman history, very much matter of pure speculation, or inference from later historical practice.

Illegitimate birth, whatever its results may have been to judge from later legal developments, cannot possibly account for any but an infinitesimal amount of the predominating number which is consistently attributed to the Plebeians, from their first appearance.

The same remark applies to Manumission. The emancipated slave was most probably a rare occurrence, in the

²¹ See n. 14^a. Mommsen, Forsch. i. p. 384, n. 52, regards this treatment as that of an offence against the community. Indirectly it may be, but, comparing the words of Servius, ad Aen. 6. 609, on a breach of duty by Patron against Client, "Sacer esto," with those of Festus (F. p. 230, Plorare) on a breach of filial duty by a son "divis parentum sacer estod," I maintain that the obligations, in the former case, are rather to be considered, as in the latter, directly a matter of family and religion. See also Jhering⁵, i. p. 237, n. 131^a.

²² Blackstone, iv. pp. 75, 203: Hale, Pleas of the Crown, i. ch. 29: Coke, Instt. iii. ch. 2, &c.

²³ Msr.³ iii. pp. 68, 69. See Dionysius, 2. 14, on the province assigned by Romulus to the $\delta\eta\mu$ οτικὸν πλ $\hat{\eta}\theta$ ος.

simple early times²⁴; nor does the argument based by Mommsen upon the connexion of patronus with pater²⁵ appear to have much relevance upon the question whether clientela arose, at first, mainly from manumission.

The more frequent source of original clientela would most probably be the voluntary seeking of protection, by an outsider, from some member of a closed circle or community. This is the so-called applicatio²⁶, which agrees very well with the sense of Dionysius' Greek equivalents to patronus and cliens (above, p. 261), and bears at the same time, a peculiarly strong resemblance to the feudal commendation.

Later optional patronus. When, however, the Servian administration admitted the Plebeian, as the owner of land, to military service and political duties—though office appears to have been still denied him—this condition of dependence was henceforth non-essential as far as their individual law worthiness was concerned. Whether and how long they may have striven to connect themselves with some patrician gens, in order to belong to a curia, or for general help and countenance, we cannot say, but a client-ship entered into with this view would be rather a nominal

²⁴ Karlowa, RRg. i. p. 40, goes so far as practically to deny the existence of Manumission in the älteste Recht.

²⁵ I do not quite see his point. It seems to be that the Patron stands rather in the relation of Father, than in that of Master, to the enfranchised slave, and is capable or competent to protect him, like a Father, as matrona is capable of Motherhood (see above, § 3, n. 125). The original intention of the extended term matrona I must confess that I cannot explain. Patronus appears to me to be a Father in a wider or more extended application: but see Corssen², i. pp. 577, 578 as to the mere formative character of the termination -ono. The article Patr- in Festus, F. p. 253, even if correctly restored by Müller, comes to little but an argument improvised by an etymologer.

²⁶ Msr.² iii. p. 64, and Jhering⁵, i. p. 236. The word seems scarcely to be a regular legal term: see however, Cicero, de Oratore, 1. 39. 177, where jus applicationis is said of the Patron's rights in this case, Msr. iii. pp. 62, 63.

than an actual state of dependence^{26a}, and compatible with an actual opposition to patrician influence, in case of a conflict of class interests, like the election of tribunes.

Henceforth it would appear that the commendation of the non-patrician to some patrician patronus, although frequent, on the ground of interest, was a matter of choice; not of necessity, as it had been in the days when the former could only be represented by the latter²⁷.

In fact, in the Roman Courts as we know them, the principle of legal representation, in any strict sense, was a matter of very late development.

The peculiar patronage which arose from enfranchisement whether by Patrician or Plebeian, had substantial legal results, surviving, as we know, to the time of Gaius. But the optional patronage, which apparently descended from the old relation, and which subsisted from republican times to the early empire, was at once different in its origin, wider in its scope, and less stringent in its obligations. The patron was simply an influential friend, patrician or plebeian, to whom the client voluntarily attached himself. The still later^{27a} patronus of the Courts, was this influential friend developed into, or replaced by, the orator, who used his gifts or position to put, more strongly than his client could, the legal points, with which the latter had been furnished by a prudens, or chamber-counsel.

Jhering on precarium and peculium. Jhering, who calls attention to this resemblance, at the same time distinguishes the Vassal from the Client, by making the

^{26a} Msr.³ ii. p. 272, iii. pp. 67, 68, 71.

²⁷ Dionysius, 2. 10: Msr. iii. pp. 82, 83.

^{27a} There is surely a considerable development from Menaechmus, the careless man of the world, who knows some law, but drops casually into Court to oblige a well-to-do friend, and Cicero the keen young practitioner, daring to brave the influence of the almighty Sulla. See Plautus, Men. 4. 2. 5, 25—32, and the argument of Cic. pro Rosc. Amerino.

grant of land the origin of the former condition, legal defencelessness that of the latter. But even in the former specially feudal principle-setting aside the details of personal relationship—he himself indicates remarkable points of resemblance, both as to the grant of land and the original meaning of the word Fee (Vieh). I refer to his ingenious and probable suggestions with regard to the Roman precarium and peculium. The former may, he thinks, have originally been property-mainly land-held by the Client on request from his Patron, though secured by no obligation of strict law, which indeed was, he holds, impossible between the parties. The latter was probably a literal small herd, either an actual portion severed from the larger stock of the Lord, or the particular acquisition of the Client, which in effect was considered as legally still belonging to the Patron²⁸.

2. Plebeii as members of conquered populations. This form of clientela (by applicatio) is represented by Cicero as resulting ipso facto from the surrender of a conquered nation to a Roman general^{28a}. How far this practice of quite late and historical times can be credited for anything similar in the numerous apocryphal conquests of the Earlier Republic may be questioned. Whatever be the main source of clientela, Mommsen winds up with the conclusion that in the old patrician community every domiciled freeman, not a patrician, must have been under patrician Patronage²⁹.

²⁸ Jhering⁵, i. pp. 236, 239, 243. See also Karlowa, RRg. i. p. 39, and the passages quoted in n. 1. The distinction of pecunia from familia (Jurisprudence, ii. p. 544), appears to depend upon a different principle, the former word being connected more directly with the root signifying confinement or enclosure, which lies at the bottom of both pecunia and peculium, as of the shorter pecus (see Curtius⁵, p. 268).

²⁸a Cicero, de Officiis, 1. 11. 35.

²⁹ See generally Msr.³ iii. pp. 64—66. To the other authorities cited on this subject must be added Festus, F. p. 246, *Patres* (see § 8, n. 6).

This view, as to the first origin of the *Plebs*, will account fairly well for the existence of such plebeian *gentes* as are historical doublets of patrician: also for a certain proportion, consisting of incomers to a rising community, who would naturally attach themselves to powerful protectors, at a time when at any rate *full* burghership was, as we may certainly believe, confined to a circle pretty accurately defined though not yet expressly closed. But it is not reconcileable with the preponderating *numbers* consistently attributed to the early Plebeians, unless we accept the tales of victory and bodily transfer of population, in which we find so much contradiction and repetition, if not obvious fiction³⁰.

Mommsen and Soltau. Mommsen accounts, not, to my mind, very satisfactorily, for the distinct antagonism which is very early recognised between the Clients of the Patricians, acting with their Patrons, and the remaining plebeian mass, by a transition rapidly supervening, in the main, from the semi-servile condition into that of the independent Plebeian³¹. He somewhat contemptuously relegates to a note³² the view of Soltau who still maintains a juxtaposition of patrician and plebeian elements from the first beginning of a united Rome. This is the view to which I myself incline, though I cannot claim Soltau as a supporter of my own peculiar theory, which I need not here repeat, as it has been more than once indicated above (§ 6, pp. 234, 239).

³⁰ These, however, appear to be accepted by Muirhead² (p. 10), Sohm (Ledlie³) (p. 40) and Karlowa, RRg. (i. p. 62): the last quotes a host of older authorities, beginning with Niebuhr, all of whom consider conquered populations to be the chief origin of the *plebs*. I think Mommsen rather tends to this view, which a little conflicts with that expressed above in n. 4. Girard⁵, p. 16, admits all the above mentioned origins, without giving the preference to any.

^{3r} Livy, 2. 35: Dionysius, 6. 63: and generally Msr. iii. pp. 68—71. ³² Mommsen, ib. p. 69, n. 1: see too Karlowa, l.c. for his particular objections to this view.

Leaving hypothesis, I proceed now to discuss some particular difficulties, as to the accepted facts with regard to the Plebeians, availing myself of course, in spite of my dissent as to origin, of the invaluable assistance, on other points, of Mommsen, with occasional qualifications from Karlowa and Girard.

Plebeian gentes. The existence of these, in perfectly historical times, is too well known to need statement. For my present purpose they may be divided roughly into (1) such as are alleged doublets of patrician gentes, and (2) such as are not. Of the former case, instances for which there is more or less authority are given below³³. Persons belonging to these plebeian gentes may be accounted for, as has been said, by individual clientela. It is quite in accordance with the established practice of Manumission that the libertus should take the gentile name of his Patron and should so, in some way, belong to his gens³⁴: to the extent, indeed, according to Mommsen, of taking part in the gentile sacra; though the passage which he adduces in evidence seems to me better explained by a secondary (§ 9, p. 320) recognition of the curia, as a local division³⁵.

Even in these doublets, however, we have to explain the formation of a mass of individual clients into what could be regarded as a *gens*, here homonymous with a patrician one; in the other cases (2) the more unlikely developement of a plebeian family or families into a *gens* entirely new. Of the former formation we find one solitary recorded instance in the case of the Claudii (§ 16, App. III. p. 562).

³³ Antonia, Aquilia, Claudia, Julia, Lucretia, Marcia, Papiria, Pitinia, Veturia. But see as to Papiria above, p. 259: as to Marcia and Julia, § 5, App. 1: as to Claudia and Veturia, Msr. ³ iii. p. 61.

³⁴ Msr. iii. p. 74, represents the Plebeians as Clients belonging "passiv" to the patrician gentes.

³⁵ Msr. iii. pp. 77, 78, 94: Ovid, Fasti, 2. 527, cited ib. n. 1, p. 78. As to local *curiae*, see § 9, l.c. and § 16, pp. 513, 517.

Quasi-gentile organisation. The latter development seems to have been effected by an application of the old patrician gentile rules, as to succession, tutelage, agnatic connexion, &c., among the Plebeians in question³⁶; the association being consolidated by quasi-gentile sacra, and perhaps completed by a recognition of the related families as a gens, on the part of the Pontiffs, probably also by the original patrician gentes in their curiae³⁷. This recognition must also, Mommsen thinks, have necessarily involved the attribution of the new gens to some one of the old curiae³⁸.

All this appears to me fairly compatible with the suggestions, which have been previously made here, as to the origin of the Plebeians; some period being assumed at which a closed line was finally drawn around the particular gentes up to that time recognised, and henceforth constituting the patrician Order.

These doublets of a patrician gens, and generally the admission of plebeian stocks at all as gentes, may also be partly illustrated by a phaenomenon adduced by Sir H. Maine in his Village Communities, though rather intended, I think, as an explanation of the Roman gentes majores and minores.

The faculty of taking in strangers is one which the village groups in India may be clearly inferred to have once

³⁶ This quasi-gentile organisation is strictly called *stirps* according to Msr.³ iii. pp. 74—77, referring to Cicero, de Orat. 1. 39. 176. Karlowa, (RRg. i. p. 37), takes a slightly different view of *stirps*, which he confines to the case of a plebeian *gens* (or *stirps*) connected with a patrician one. We may recognise some parallel in a case of Welsh tribal custom quoted by Seebohm (T. C. p. 51), according to which the great-grandson of a *stranger* might, although through the process of becoming *adscriptus glebae*, gain the recognition of a *status*, as the founder of a *kindred* of his own, the members of which would afterwards be able to swear for and defend one another in the regular manner.

³⁷ Msr. iii. pp. 74, 75.

²⁸ ib. p. 94. Most of these points are doubtless suggested by the precedent of the Claudii (§ 16, App. III).

possessed, but which it has now almost entirely lost. In the complex structure of these interesting communities, we occasionally find "some dominant family claiming superiority over the whole brotherhood and even over a number of separate villages, especially when the villages are part of a larger aggregate tribe or clan. Besides this, and more frequently, there occurs in the community itself a certain number of families, who are traditionally said to be descended from the founder of the village. Below these families are others distributed into well-ascertained groups. The brotherhood in fact forms a sort of Hierarchy, the degrees of which are determined by the order in which the various sets of families are amalgamated with the community³⁹."

Plebeian marriage. In speaking of the plebeian gens, I am obliged to recur to the subject of plebeian marriage, which has been anticipated to a considerable extent in § 3. We have again to consider what were the original family conditions of the lower Order, as to be gathered inter alia from the story of the Canuleian law, and the particular taunts attributed to the patrician party, in the speech put by Livy into the mouth of P. Decius Mus, on the discussion of the Ogulnian law. The style, in this latter case, is of course rhetorical and exaggerated: but I think it may certainly be taken, without any undue credulity, as a fair representation, pro tanto, of the more extreme patrician tenet that the Plebeian had originally nothing which could be called gens because he could not claim or quote a father (above p. 259).

Taken literally, these words cannot with any strictness be interpreted as merely equivalent to *free-born* (above n. 9). If they are not simply and solely a piece of Augustan etymological guess-work, they ought to mean that the offspring

³⁹ Maine, V. C. pp. 128, 166, 176, 177.

of plebeian unions were originally only mother's sons, standing in the same position as the children resulting from an incestuous union or promiscuous intercourse⁴⁰.

This appears so improbable a state of things, to have been seriously maintained with regard to an obviously large part of the population, that several modifications of it (at least de facto) have been suggested by those who take primâ facie the literal view. To one suggestion of Muirhead's, in particular, I must venture to take exception. This is, that the original Plebeians lived, or were understood to live. in a state of cognate relationship, as distinguished from the agnatic connexion of Patricians 41. Now that the wider relationship was recognised early for certain purposes there is no doubt (see § 3, p. 66; § 4, p. 126); but there is no evidence to connect this recognition with one Order particularly. and to press it as a distinction between them seems to be unreasonable, if not to anticipate the principles of a Praetorian reform based on grounds of natural feeling and convenience belonging to a far later date than the Regal period or the early Republic42. The view taken above in § 3 may be briefly restated here. No doubt the Plebeians had not, from first to last, power to contract confarreatio: at least, such attempted alliance would not have been recognised by the (patrician) officers of religion 43. Possibly, no conventio in manum was admitted among them before that of coemptio, which is not unreasonably connected with the Servian reform. It is probable, too, that conubium between Patrician and Plebeian was considered question-

⁴⁰ Gaius, i. 64.

⁴¹ Muirhead², p. 35. Klenze's work there referred to is the Familienrecht der Cognaten und Affinen. I rather agree with Prof. Goudy, in his addition to Muirhead's note, pp. 35, 36, except as to the quotation from Cato (see my § 4, p. 123).

⁴² id. p. 275.

⁴³ See above, § 3, p. 78.

able^{43a} before it was abolished by the Twelve Tables. But that there was ever no conubium between Plebeian and Plebeian; that nuptiae, by mere consent and deductio domum, whether strictly justae or not, were ever regarded as of no effect, and the issue as illegitimate, seems to me incredible. Potestas is, as we have seen, made by Gaius to depend on conubium, whether the wife comes in manum or not⁴⁴: but, except as to the two points mentioned above (confarreatio, and perhaps original manus), I can find no definite authority for attributing to the lower Order any materially different customs or rights, as to family relationship, from those of the higher⁴⁵.

After lex Canuleia. After conubium between all Roman citizens not personally disqualified (§ 3, p. 68) was definitely established by the legislation known as the lex Canuleia—445 B.C., all children of such subsequent unions would be in potestate, though their mother would not necessarily be in manu. Henceforth, a clear patrilinear descent would always be traceable and a series of agnati proveable: so that the existence, among Plebeians, of the gentile principle, which depended upon the existence of familiae, in the larger sense (§ 4) becomes natural and easy. The much debated question of the early presence, if not the full voting power, of the Plebeian in the curiae, must be postponed to the section treating specially of that subject.

Connexion of certain plebeian gentes with sacra. Before concluding the present section I must again call

^{43a} Even so late as 296 B.C. 150 years after the *lex Canulcia*, we hear of "the matrons" debarring, from the *sacra* of the patrician Pudicitia, a patrician lady, who had married a Plebeian of eminence. Livy, 10. 23.

⁴⁴ Gaius, i. 56. For the apparent contradiction between Cicero, Topica, 3. 14, and Boethius, see § 3, pp. 80, 81.

⁴⁵ This view is, on the whole, confirmed by Mommsen, Msr.³ iii. pp. 79, 80, and implicitly by Muirhead³, in his concession that "the majority (of the Plebeians) were of Latin origin," p. 35.

attention to the somewhat startling fact that there are cases, in historical times, of gentes, connected with sacra regarded as of national importance, which nevertheless remained plebeian. The most remarkable, perhaps, is that of the gens Aurelia which is described to us by Festus as of Sabine origin, and having a site publicly assigned to it by the Roman people, for performance of worship to the Sun, from which it takes its name (§ 5, p. 140). This, and some slightly similar cases are considered in Appendix 1 to § 5, pp. 175—181.

Conclusion. The origin of the first Plebeians, as a matter of pure hypothesis, may, I still think, be referred to a slight ethnic difference between the first two tribes. This might conceivably result, as to the inferior Order, in a later adoption, in its thoroughness, of the Patriarchal principle not certainly indicating any subsistence of a distinct Mutterrecht but connected with a less solemn and less binding form of marriage. Paradoxical as it may seem, I am disposed, not entirely without grounds perhaps hardly approximating to evidence, to identify this ruder element with the Ramnes, overrunning the more advanced and ceremonial Sabines or Tities, who, however, succeed in assimilating a considerable part of their conquerors, and thus form the nucleus of the patrician Order (see § 6, App. p. 253).

Public and Private Law as respectively patrician or plebeian. In various passages of this and preceding sections, besides the above hypothesis, a corresponding distinction has been hinted at, in early Roman Law itself. The division of law generally, into Public and Private, is one which I agree with Austin in deprecating, not having found it logical or practical. The two divisions, however, appear to have been recognised, together with a third (sacrum), as distinguishable, in the Code of the Twelve Tables, by a rhetorical poet

(Ausonius) living in the latter part of the 4th century A.D. when some sort of a version of the Code was evidently still existing, though anything purporting to be a copy must certainly be questioned 46. As an exhaustive division of any modern body of Law, that of Public and Private has been rejected elsewhere 46a by me, for various reasons which it is not necessary to repeat.

At present we are only concerned with it as applied to Roman Law, and to that law in its earliest stage. For, whatever we may make of such an original division, the effect of the distinction of Patrician and Plebeian, as bearing upon it, was in practice entirely superseded by the later distinction of Civil and Praetorian long before the main part of what we know as the true historical law of Rome began to be formed.

In Muirhead's interesting sketch of the Roman customary law during the period before the reforms which go under the name of Servius Tullius, the distinction of Public and Private is clearly regarded as inadmissible with regard to offences or wrongs⁴⁷. In this I not only agree, but should extend that inadmissibility to almost everything that can be reasonably called Law in that period, and to most part of the early law in the period immediately following.

Dr Moyle, on the other hand, assumes the distinction generally as real, and proceeds to discuss its applicability to the early history of Rome. This polity he regards as originally a military state pure and simple, in which all other considerations are postponed to the perpetuation of existence; all Law is Public and presumably (though this is not expressly stated) Patrician. The Private branch is somewhat hesitatingly described by him as developed out

⁴⁶ See my Sources, p. 24, and Schöll, Rell. pp. 17, 18.

⁴⁶a Jurisprudence, ii. pp. 445, 447-449.

⁴⁷ Ed. 2, chaps. 1-3, particularly p. 51.

of the former, mainly under the influence of the Plebeian element^{47a}.

By the way, he dismisses in a few words (p. 15) the idea of Puchta and others, which attributed to the combination of two separate ethnic stocks, the Pelasgic (Ramnes) and the Sabine (Quirites), a blend of principles—that of external relations and conquest, on the one hand, with that of domestic order and internal development on the other. These do not appear to be expressly identified with Public and Private Law, but may perhaps be considered as corresponding to these divisions respectively.

It will be remembered that much the same ethnic elements, whether the first be called Pelasgic or not, have been here identified, ex hypothesi, with a lower and a higher degree of social, or rather family, development.

The alleged developement, moreover, of Private from Public Law, mainly under the influence of the Plebeian element, is apparently connected, by its supporters, with an assumption of the original non-existence of Private Property, at least in land, and with the introduction of a special form of conveyance (mancipatio) for certain res mobiles. Now I have already endeavoured to shew that the original non-existence of Private Property, in land, is extremely questionable. As to the theory about the origin of the distinction between res mancipi and res nec mancipi, I cannot do better than refer to the valuable note (p. 17) of Moyle himself, which admits the ability of Muirhead's view, though it is not the one adopted by the author. To that view I myself entirely subscribe: that the distinction in question is simply a result of the Servian registration, which depends upon the distinction of Property, as primarily necessary for an agricultural holding or not, but is distinctly

⁴⁷a Moyle, Instt. Just. 5 pp. 13, 15, 18.

intended to ignore that of Persons as Patrician or Plebeian 48.

In the further reasoning of Dr Moyle as to the relation of Public and Private Law in early Rome, and the developement of the latter from the former, he practically leaves on one side the idea of connexion with a Patrician or Plebeian element and dwells rather on the antithesis of the State and the Individual; following, in this respect, the lead of Jhering⁴⁹. To pursue that reasoning, therefore, is to digress from the proper subject of this section: and I only do so in the hope of removing one source of ambiguity in the many which sometimes beset one in endeavouring to understand what Jhering exactly means. That ambiguity in the present case is the everlasting difficulty of the same word being used, in German, for what Savigny distinguishes as Subjective and Objective Right⁵⁰.

In Jhering's first part of his Starting-points (Ausgangs-punkte) or Original Elements of Roman Law⁵¹ he means by the "Subjective Will" the Right, or conceived Right, of the Individual: in the second—the special starting-point of a State order or arrangement (p. 176)—he places the general Family principle (gentes, &c.) combined with, or affected by, the Organisation for War⁵²: in the third, the influence of Religion⁵³.

⁴⁶ My own distinction of familia and pecunia (Jurisprudence, ii. p. 544) is, of course, entirely different from that of Cuq, as cited by Moyle. With all respect, moreover, for the latter, I do not think that the vague expressions of Cuq (see particularly pp. 92—93) quite bear out his own conclusions. The view of Voigt, that the distinction of res mancipi and res nec mancipi, under those names, only dates from a constitutio jurisperitorum (?) of some 150 B.C., is scarcely tenable, against the general consent of writers, as to its antiquity, on the strength of the mere general expression constituebatur of Gaius, 2. 16. See however further below, § 16, App. Π.

⁴⁹ See Jurisprudence, ii. p. 637.

⁵⁰ Savigny, System, i. pp. 7, 9. 51 i.5 §§ 9-12, pp. 107-176.

⁵² id. §§ 14-17, pp. 183-265, see particularly p. 183.

I have ventured to take a somewhat different view as to the original feeling which leads to State organisation properly so-called, and the primary object of such organisation, elsewhere⁵⁴. What I wish to point out here is that this particular part of Jhering's very subtle, but somewhat speculative reasoning does not seem to have much bearing upon the distinction of Public and Private Law, as generally understood, in a State, and still less upon the specific distinction of the two, in early Rome, as arising from a Patrician or Plebeian element. The passage ultimately quoted by Moyle (on p. 20), which is from Jhering, i. p. 222, merely amounts, in my view, to this: that general legal rules or principles are built out of individual decisions as to Right and Wrong (see Jurisprudence, i. p. 103).

The connexion of Public or Private Law with the Patrician or Plebeian element in the very hypothetical "history" of nascent Rome seems to me to be simply this. The earliest coalition which approximates to a State, is an arrangement of gentes, already distributed, as such, into curiae, at some time when the circle of these gentes was, either by outside influence or internal agreement, closed (see above, p. 260 and below, § 9, p. 314), and the closed circle had become the Patrician Order. The monopoly of office, with a few early exceptions (see below, pp. 318, 364) by that Order, at the beginning of the Republican period, and the gradual destruction of that monopoly, are of course matter of Constitutional or Public Law. As the outsiders acquire a share of privileges at first denied them, and notably of legislative power, such legislation will obviously be, in general, matter of Plebeian initiative. Common or ordinary Law, so far as it arises from the more

⁵⁴ Jurisprudence, i. pp. 98, 163, 164, 166. The part played by Religion, and the *order* in which that formative element comes in, are more fully treated, as to Rome, hereafter. See the section on *curia*, which Jhering regards simply as a *military* element (i.⁵ 178), and those on the development of Sovereignty at Rome.

developed family or gentile relations, may be regarded as mostly Patrician, at least in origin: but I imagine that such developement was probably much the same in the more advanced element among the outsiders, as in the Patrician circle. Individuals, on the other hand who did not attach themselves to Patricians, or follow the Patrician pattern of gentile formation, would require and, as their numbers increased, would bring about, legislation of a more general character, based on ordinary hardships and requirements. Such Law is naturally Private and, as a matter of fact, mostly Plebeian. But as many principles and rules will be Private in one respect and Public in another, it is difficult to draw a clear line of distinction, and I doubt whether any Roman, until late philosophising times, ever thought of drawing one.

Senate and Curia. There remain two institutions equally attributed to the Romulian⁵⁵, i.e. the absolutely prehistoric, period: a popular assembly by curiae (comitium curiatum), and a council of Elders (senatus), who were expressly recognised as representatives of the curiae and implicitly of the gentes included in the curiae.

The Council of Elders is an institution common to Aryan nationalities generally. It requires special notice at this part of our enquiry from its connexion with the Patrician order.

The curia, on the other hand, if as I believe, an association primarily religious (see § 9, p. 314) is, though by no means unique, a rather special feature of the original Roman Polity. And it is through the intervention of a common High Priest connected with the curiae that I myself am disposed to trace the gradual development of Sovereignty, and so the creation of a fully formed State, at Rome.

Monopoly of office, and of land, by patricians. The assignment of so many gentes to a curia which has been several

⁵⁵ Dionysius, 2. 12, 14.

times referred to, as possibly dating from the establishment of the Tarquinian dynasty and the accession of a genuine Sovereign, is no doubt connected with the definite closure of the circle of gentes and the distinct crystallisation of an aristocratic Order. That this Order should possess a monopoly of the offices which were in their original representation connected with the Religion itself connected with or springing out of the sacra forming the main gentile bond of union is natural and requires little or no explanation.

For the patrician monopoly of land, we must, I think, refer back to the supposed source of the original gentes in the followers of the military head typified by the legendary founder (see § 5, p. 169). And I would again call attention to the passage of Nonius⁵⁶ in which Cicero's statement, of that founder's division of land taken in war, to individual citizens, is coupled with one of Varro repeating the same division, to freemen, of the extra urban territory, already portioned out into 26 regiones which clearly correspond to Servius' 26 rustic tribes (§ 16, p. 516). Hence arose, in my opinion, the alleged right of the Patricians, as descendants of these original gentiles, to possession of any conquered territory (ib. pp. 504 sqq.).

⁵⁶ Nonius, p. 43, viritim.

§ 8. THE SENATE

Form and meaning of word senatus: the only deliberative Roman assembly, p. 280. Life tenure and political character, 281. Patres and patricii, 282. The Senate and the curiae, 283. Lex Ovinia, 284. Decuriae decas contubernium, 285. Curio and decurio, 286. Interregnum, decuriae, ib. Total number, 288. Equality of Senators, 289. Election or non-election, 290. Conclusion, ib. Jhering on witnesses in confarreatio, 291. Gentes majores and minores, ib. Patres conscripti, 293. King and Senate, parallels, 295. Appendix, Interregna, 298.

Senatus. The form of this word is curious, appearing rather to indicate a position or office than a body of persons, as also to require a root verb senare¹. But the word was no doubt in ordinary use as early as the time of Plautus to indicate an assembly of Elders², an institution common to more than one Italian stock as well as in other Aryan races. A few words on its general character in the Roman Polity may precede the attempt to reconcile or explain the conflicting accounts of its original constitution, in regard to their bearing upon that of the early Roman State as a whole.

The Senate was originally the only regularly deliberative assembly at Rome. Non-official meetings of other bodies there might be, at which discussion took place: regular assemblies, at which a definite resolution could be put, and

¹ Msr. ³ iii. p. 836. n. 4. See however Roby, Gr. i. pp. 294, 295.

² I mention Plautus as earlier than the famous Sctum de Bacanalibus, B.C. 186. It is scarcely necessary to give authorities for the word, or its meaning. See however Festus, F. p. 339. Senatores a senectute dici satis constat, quos initio Romulus elegit, centum quorum consilio rempublicam administraret.

carried or rejected; but this seems, at any rate for a very long time, to be the only official body, that had the modern Parliamentary power of amending and recasting the projects of law or administration, on which it was consulted by the chief magistrates, whom we may almost come to regard as its officers.

Life tenure. Moreover the position of Senator, however attained, appears to have been, probably until the beginning of the 4th century B.C.³, for life: a tenure which gives to a plural board a continuity and, if unchecked by other influences, an ever-increasing power. This might hold good, even as against the single appointing king⁴, except in cases of great determination and ability: a fortiori as against his successors the pair of annual Consuls, by no means necessarily unanimous, not perhaps intended to be so. Over a national assembly, too, such a Council of Elders must have a great advantage, until the former is organised into, or replaced by, a similarly deliberative body.

Hence the Senate was, until the Empire, by far the most important element in the Roman polity, and, under the Empire, the last important remnant of the Republican régime. As to its general political character, we are not left in any doubt. It was at first the representative of the

³ See Festus, F. p. 246, Praeteriti and below p. 284 on the lex Ovinia.

⁴ In the Greek Monarchy of Homer, neither the people, whether as individuals (λaoi) or as assembled $(\dot{\alpha}\gamma o\rho\eta)$, nor the βουλή (whatever of volition may have originally been indicated by their name (see Curtius, p. 549) seem to possess much independent power. Yet there is little reason or probability in the existence of either $\dot{\alpha}\gamma o\rho\eta$ or βουλή, except as degradations of what once were substantive powers. I have suggested a probable derivation of the βασιλεύς elsewhere: I hesitate, on the subject of the Homeric king, whether to regard him as a fully developed sovereign, or as a temporary commander (ἀναξ), possibly corresponding to the presumed original Roman tribunus (see § 12). Thuoydides in the second chapter of the first Book appears to be describing something like the latter. The Minoan king, according to modern research and ancient tradition, certainly rather resembles the former.

patrician Order, and afterwards, of the Conservative party. So the general term populus, when it is used out of its proper signification (of the whole body politic) in antithesis to the Senate, takes different meanings at different times. When spoken of in this antithesis, populus and $\delta \hat{\eta} \mu c_{\delta}$ are, for the first half of pre-imperial history, almost equivalent to plebs: for the last half they are the democratic or reforming party. It is, of course, with the earlier part of the former period that we are now concerned.

Patres. The members of the Senate, in its oldest form, were undoubtedly members exclusively of those gentes which continued to be known as patrician; but that term, being itself a derivative from patres, cannot be used to explain the latter style, or its undoubted application both to the Senate and the patrician Order. The fanciful derivation from patrem ciere has been considered above (§ 7, p. 259); and Mommsen, who collects most of the passages bearing on this subject in Msr.3 iii. p. 13, nn. 1-3, appears to consider it as representing in fact (der Sache nach) the same thing as what the latter half of the word really was-a mere suffix. But, as this view involves the non-recognition of legal paternity among the Plebeians (§ 7, p. 271) which appears to me extremely improbable, even for the earliest times, I prefer his earlier explanation (Forsch. i. p. 228, n. 1), according to which patres meant, in the original gentile constitution, simply the Senate. Whether the first persons elected or appointed were actual heads of families or gentes (principes is Cicero's word) or called patres out of compliment (Livy), or from their solicitude for the State (Sallust), or to express affection (Cicero), depends upon the particular author's reading of the mind of Romulus⁵.

⁵ Livy (1. 8), after various fantastic reasons why Romulus' original Senators were only a hundred, is in no doubt that they were called *patres*, ab honore: Cicero (de Rep. 2. 8. 14) holds that they were so named propter caritatem, both agree that the patricii were the children of these patres

The probability is that this was originally a meeting of all heads of families within the old gentile association, but was narrowed to a certain number on that re-arrangement, whenever made, which organised the original gentile and Curiate constitution (see § 6, pp. 247, 248). It does not seem improbable or unnatural that the term should be, on occasion, applied, extensivé, to the whole body of which these Senatorial patres were representative, as it certainly appears to have been, if we are to consider the stories about the abolition of conubium between the Orders, by the later Decemviri, to contain any terminological accuracy.

The Senate and the Curiae. In entering upon this part of the present subject, I am obliged, in some degree, to anticipate the following section by assuming the existence of the curiae, as associations of gentes. This anticipation is,

(Livy, l.c., Cicero, de Rep. 2. 12. 23). According to Festus, F. p. 246, by an etymology, which I may be wrong in attributing even to this author, patres was the name given to the persons, out of whom the Senate was first composed, because they distributed partes of their lands to the poorer class as to their children (see Cicero, de Rep. 2. 9. 16 and above, § 7, pp. 264—266).

In the ancient laws of Wales (Lewis, pp. 88, 89) the seven elders, or Heads of households (penteulu), who act with, and for, the pen-cenedl, may, as within a kindred, be to some extent compared with the Roman King and Senate, as within the associated kindreds of the first Roman Constitution.

In Teutonic antiquity the *principes* of Tacitus (Germania, 11, cf. Caesar, B. G. 6, 23), before whom matters, on which the ultimate decision is represented as *penes plebem*, are previously discussed (*praetractantur*), are simply chief warriors, whose assent is signified by the clash of arms.

In Anglo-Saxon history, the summons of the Witena-gemot corresponds very closely to the legendary selection of his Senate by Romulus. This (A.-S.) council is however evidently "a later developement than the lower Courts, being a consequence of the institution of Royalty," Stubbs, C. H.⁶ i. p. 133.

The Council of Elders indicated in Celtic antiquity is possibly a more independent and original institution. We may compare, besides the Elders mentioned above, the many Welsh words compounded with hen and dwr; in Greek the γερονοία, in Semitic antiquity, the Senate of Elders (Robertson Smith, p. 34).

Livy, 4. 4. 5. ne conubium patribus cum plebe esset; Cicero, de Rep. 2. 37. 63. plebei cum patribus. Dionysius, 10. 60 has πατρικίοις.

however, necessary for any explanation of the original constitution of the Senate, which subject it is desirable to take, as a whole, first, as being, in itself, an institution by no means peculiar to Rome or the Latin race. There are obvious general parallels to the Roman Senate both in Greek history and poetry, and in those of our own Teutonic and Celtic ancestors?: but I shall confine myself to the particulars of the Roman institution. Here, as always when possible, my endeavour is to work back, from established facts, to the origins, in which there must be much matter of hypothesis, only taking care so to frame the hypotheses as to take in and account for the survivals.

Lex Ovinia. I assume then, to begin with, that the original Senate was in some sense representative of the curiae, from what I consider to be the quite historical provisions of the lex Ovinia. Of this enactment it is true that our only information comes from Festus; but he is usually considered a fairly trustworthy authority for antiquities, and the difficulties connected with the lex Ovinia, to my mind, rather vouch for its authenticity. It has been put by modern historians as early as 432 B.C., but from its nature and object it would seem to be rather connected, in proximity and provenance, with the famous censorship of Ap. Claudius Caecus in 312.

This law enacted that Senators should be chosen thenceforth by the Censor, ex omni ordine curiatim. Of the particular reform directly intended, and the explanation of the words ex omni ordine, I postpone consideration until nearer the date of the Censorship above referred to. The point which I wish at present to press, is that the choice is to be made curiatim, which I take as evidence of the position just stated, that the Senate was originally, and continued to be regarded as in some way representative of the curiae, or

⁷ See above, the latter part of note 5.

arranged according to the curiae. Detail will be considered hereafter below (§ 9), but I would remark en passant that the retention of this Curiate constitution of the Senate, by an enactment obviously intended to facilitate the introduction of Plebeians, is strongly in favour of the view, that either plebeian gentes were, on recognition, assigned to one or other of the ancient curiae, or that the Plebeians, all along, belonged to the curiae, as local districts⁸.

Decuriae. The divisions of the Senate called decuriae are mainly connected with, and to be explained by, the practice in interregna. Before, however, we enter on that very doubtful subject, we may take warning against certain most probably erroneous views, from philology. Decuria appears to be taken by many authorities, ancient as well as modern, to mean a tenth part of a curia9. In the wellknown passage of Dionysius quoted in an earlier section (§ 5, p. 170), Romulus' division of a tribe into 10 curiae was, according to this author, carried further to a sub-division of each curia into Decads, every Decad having its Headman the δεκάδαρχος, under a Latin name, of the same import, δεκουρίων. These Decads and Headmen of Dionysius obviously correspond to the decuriae and decuriones of Varro, being treated by him as sub-divisions and subordinate officers of the original Cavalry10. But the point is that, whether they are tenths of a larger body or not, and whatever that body may be, all that is expressed by the words decuria and $\delta \epsilon \kappa \acute{a}_{\varsigma}$ is a body of ten men¹¹.

⁸ See § 7, p. 269 and Msr. iii. p. 93.

⁹ In the older issues of Mommsen's History it is identified with the individual *gens*. This idea, however, is given up in Msr. iii. p. 92, n. 1 and p. 104.

¹⁰ See Varro, L. L. 5. 91, Turmae, and Festus, P. p. 71, Decuriones.

¹¹ Compare centuria and see Msr. iii. p. 104, nn. 1, 5: Corssen², ii. p. 683. Jhering⁵ (i. p. 184, n. 78) appears to hold them as representing the gens considered with reference to its contingent in a military organisation, id. i. p. 250.

The above are represented as divisions of a people or a host: in the latter point of view they are probable; indeed, in the nature of things, almost inevitable, although it may be doubted whether the smaller ten would not naturally come first in order, as a component rather than as a sub-division of the larger hundred. It is not impossible that the later Republican, or Imperial, contubernium may preserve an immemorial tradition of the original Decad¹²; which may, as has been already suggested, have furnished a nucleus for the gens. I must admit, however, that the gens, as a formed entity, cannot be positively identified with either $\delta \epsilon \kappa \acute{a}s$ or decuria¹³.

Curio and decurio. But, whatever may have been the truth as to these divisions of the original Host—and I am disposed to connect some arrangement of the kind with the constitution of the original Senate—we must be on our guard against confusions arising from the similarity of the words curio and decurio. There is little doubt that the officers known in historical times by the former name were, by rights, priestly (see § 9, pp. 309, 310); while those known by the latter (belonging mostly to municipia) were neither priestly nor military, but of magisterial, or at least civil, character, and corresponded to an original organisation of the Roman Senate¹⁴.

Interregnum: decuriae. The original decuriae of the Senate, were according to Livy, an arrangement of themselves, by Romulus' hundred Senators, into ten batches, of ten men each, one man being appointed in each batch to hold the

 $^{^{12}}$ Msr. 3 iii. p. 104, n. 5, oiting a passage of Marquardt which I take to be (in Humbert's French translation) Organisation militaire, p. 137.

¹⁸ See § 5, pp. 137, 168.

¹⁴ See Msr. iii. pp. 102, 104, nn. 2, 3, p. 853 n. 1, and generally ll.cc. in Index under decuriones der Municipien. Jherings, i. p. 190, attributes to the original decurio a certain presidency over the dealings of the gens, and a religious representation of it. But I do not see sufficient proof of this. The decuriones of Festus, P. p. 71, and Varro (L. L. 5. 91) must not be forgotten.

chief Sovereignty. The ten had command, but the one only the *insignia* of command. This Sovereignty was but for five days, and came round to all in turn: the interruption (of true Royalty) did not last more than a year¹⁵.

Dionysius, after expressly recognising the total number of the Senate as two hundred, which Livy appears to ignore (see however below), represents them as dividing themselves into $\delta \epsilon \kappa \acute{a} \delta a \varsigma$, and handing over the government to the first ten chosen by lot¹⁶. This is interpreted by Mommsen to mean that Dionysius' Decads are here tenths (of twenty Senators each) and that the $\delta \acute{e} \kappa a \pi \rho \hat{\omega} \tau o \iota$ are the ten individuals who came first by lot, within these so-called Decads¹⁷. In other respects, his account is substantially the same as Livy's.

Such a government seems a scarcely conceivable reality, which one might therefore fairly treat after the manner of Pais; and indeed the historiographers of this legendary period soon bring the first interregnum to a close. A possible interpretation of the alternating succession of the first four Kings has been suggested above (§ 6, p. 237). But, as the interregnum is represented as recurring frequently during the Republic, we must see what light the accounts of it throw upon the decuriae and the original constitution of the Senate. This, which is not very much, is stated here in

¹⁵ Livy, l. 17. I have endeavoured, in my rendering of this very brief and general statement, to assume nothing more than the meaning which the words will literally bear. It would certainly seem as if the whole arrangement is understood to be ad hoc. Nothing is said of the order of the decuriae, or of the order of the individual members of a decuria, beyond the appointment of the first of such members, and what may be presumed to be necessary, in order that each might have his turn. Seeley's statement² (n. 12, p. 131) that the change of ibat to fuit confines this account to the particular interregnum in question, is correct as a matter of strict grammatical usage, though I think the view, that this is regarded by Livy as a permanent arrangement, also tenable.

¹⁶ Dionysius, 2. 57. For the addition of the second hundred see c. 47.

¹⁷ Msr.³ i. p. 656, n. 3; Forsch. i. pp. 218—233, &c.

brief: the difficult subject of interregna as matter for fuller treatment is reserved for an Appendix.

It is established beyond doubt that the Roman Senate was, in its origin, purely patrician, and it is probable that it also corresponded to the rough natural marshalling of the Host, which has been more than once referred to (§ 1, p. 15; § 5, p. 169; § 6, p. 246): further I do not think we can make any safe suggestion as to its internal constitution, and shall now proceed to consider what may be accepted as likely with regard to its total number and subsequent additions.

Total number. The original Senate as a whole is consistently made out to be a Hundred men of age or eminence, selected or created by Romulus, according to Livy and Festus¹⁸, according to Dionysius elected, mainly by the three tribes and the thirty curiae, Romulus only nominating one, to conduct the home business when he himself should be on campaign abroad19. This latter extremely artificial and complicated scheme seems to be forced on its author by what I have ventured to consider the over-early admission of the factor 3 (see § 6, p. 231). The additions which bring the Roman Senate up to its normal figure of 30020, are accounted for by the same author, according, he says, to the general agreement of Roman historians, by a doubling of the Patriciate and Senate, on the reconciliation of Romulus and Tatius (the additions being called νεώτεροι), and a further addition to the former body by the first Tarquinius of one hundred, who are at the same time made members of the Senate²¹. Livy has

¹⁸ Livy, 1. 8: Festus quoted above (n. 5) representing Verrius Flaccus and probably Varro.

¹⁹ Dionysius, 2. 12.

²⁰ It remains not only during the legendary Royal, and the early Republican, period, but down to the proposals of Gracchus, 123 B.C. (Msr. iii. p. 846, n. 1, p. 847, nn. 1, 2).

²¹ Dionysius, 2. 47; 3. 67.

no statement of the former addition to the Senate, for which he would appear to substitute a selection of Alban principes by Tullus²², though this might mean an addition either of Senators or of gentes. Implicitly he undoubtedly recognises it, when he speaks in c. 17 of the Sabine Senators. The last hundred are described as an addition by Tarquinius of that number to the Senate, these new Senators being thenceforth called patres minorum gentium²³.

This silence of Livy as to the Sabine addition is, with much plausibility, accounted for by Seelev as due to regard for consistency with his account of the interregnum on the death of Romulus. But the whole story, as well as the gratuitously symmetrical arrangement of the supposed founder in framing his constitution ab initio, are, to my mind, far better explained on the hypothesis of a real constitutional system, which consisted mainly in the regularisation of previously vague and undefined elements, being framed by a representative of the intervening third nationality, to which reference has already been repeatedly made (§ 6, pp. 237, 247). This nascent Constitution, which must certainly have preceded the so-called Servian reform, but belongs to the same dynasty with it, will be more particularly described in the next section. I have only to add here some particular points, on which the presence or absence of information requires to be noted, in what little we know for certain as to the original Senate.

Equality of Senators. In the vague pieces of information which have come to us about decuriae, a headman, whom we should naturally expect in a military division, seems occasionally to be suggested for divisions within the Senate also. But there is not, so far as I am aware, any definite

²² Livy, 1. 30. See Seeley2, p. 150, nn. 23, 24 and p. 161, n. 18.

²³ Livy, 1. 35. The irreconcileable account of Cicero is given below, p. 292.

assertion of such a headship, either in the curia, as connected with the Senate, or in a division of that body itself.

There is no standing order of precedence in the early Royal Senate, and any which is established for the *interregnum* appears to be simply ad hoc (see however above, n. 15). Indeed, one can scarcely see the object of the division into decuriae at all, and this is one of the reasons why I am disposed to regard it as the mere survival pro tanto of an old military marshalling (see however further below, p. 291).

Election or non-election of original Senators. Assuming the original patres to be, in some way, connected with, or representative of, the curiae and the gentes in the curiae, we might naturally expect some election of individuals by the rest. But our accounts of the appointment of the old Senators, however conflicting in other respects with one another, generally agree in giving no support to this idea. Almost all the traditions, which we have, represent the King as a regular Sovereign already in existence, not a mere occasional leader. And, alike with Livy, Cicero and Festus, he is the sole chooser of members of the Senate, a power which is described as descending to the earlier Consuls. The language of Dionysius²⁴, it is true, points in a different direction, and may have contributed to Mommsen's former suggestion of an original elective Senate. But in the later Staatsrecht, he does not even retain this idea so far as to confine the King or other officer's nomination to selection from the gens or group of gentes entitled to representation on a vacancy. Of election by such gens or group we know and can assume nothing25.

Conclusion. As to the internal constitution of the Senate, all we can say is, that its decuriae are, like the Senate

²⁴ Dionysius, 2. 12. The incredibility of his statement, and its possible origin, have been pointed out above, p. 288. The passage of Mommsen referred to is Forsch. i. p. 284.

²⁵ Msr. 3 iii. p. 854; see however ib. p. 869.

itself, a very old institution, and that it seems more reconcileable with the general upshot of our fragmentary information to connect them, like the ten witnesses to the ancient confarreatio^{25a}, directly with some tradition of the old military constitution of the Host (or first Tribe) than with any re-arrangement of gentes or curiae, which itself evidently depends upon the same tradition (§ 6, p. 249). I should venture to suggest, finally, that the decuriae of historical interregna may have followed pro tanto (i.e. among the patrician members) the Curiate divisions of the Senate at large, which must have been in some way retained, if the list was to be gone through curiatim (above, p. 284).

Gentes Majores and Minores. This is a distinction, as has been pointed out (§ 7, p. 259), among the old patrician gentes, meaning not so much greater and less, as older and younger or earlier and later: a distinction which subsisted, as we have seen, down to the time of Cicero, though then probably a mere matter of precedence involving no substantial privilege. It clearly indicates the association of a new circle of gentes with one formerly existing, perhaps originally on somewhat inferior terms (see § 6, p. 241). This may possibly be indicated in the statement that L. Tarquinius doubled the former number of the Senate (which Cicero must have taken, according to one of Dionysius' variants (2. 47), at 150), calling the original Senators patres majorum gentium and those added by himself patres

^{25a} In his attempt to classify the witnesses required in Roman Law, ii.⁴ pp. 525—527, by their interest in the matter in question, and consequent right of protest, if not of veto, Jhering seems wrong in classing the witnesses to confarreatio with those to arrogatio. Surely the former at any rate, as representing the original populus are blosse Urkundspersonen "parties merely for record."

²⁶ Msr.³ iii. pp. 91, 92. For the connexion of the Troy-ride of the youthful aristocracy (the Trossuli of Persius, i. 82) with this distinction, ib. p. 31, n. 3. Personal distinction of age in the *Trojana circensia* has also been suggested, Suetonius, Tiberius, c. 6.

minorum gentium, and giving the former priority in delivering opinion²⁷.

The principal value of Cicero's divergence from the more generally received traditions about the increase of the original senatorial Hundred is this: that the account which he goes on to give of a similar doubling of the equitatus, by the same king, coupled with the testimony, on the same subject, of Festus and Livy²⁸, seems to justify us in identifying these gentes minores with the secundi Ramnes, Tities and Luceres, of whom we hear in one or two passages.

The last mentioned authorities, therefore, on this very uncertain subject, are rather in favour of the view, which seems to be preferred, on the whole, by Mommsen^{28a} that the gentes minores were a second admission to three tribes, of which he retains the Romulian, or primal, origin. Our accounts are, no doubt, obscure and untrustworthy but, in my view, the theory adopted by Niebuhr, that they rather represent the incorporation of a third tribe, is more in accordance with the general run of tradition, as well as with the particular data upon which the hypothesis here adopted as to the intervention of that additional element has been supported (§ 6, pp. 236 sqq.). Apart from that hypothesis, the connexion of these additions with the name and story of Tarquinius would suggest that the newcomers would be at least partly Etruscan, of which, however, we have no direct evidence. The only family which we know certainly to have belonged to the gentes minores is that of the patrician Papirii²⁹. The first or first distinguished man

²⁷ Cicero, de Rep. 2. 8. 14; 2. 20. 35.

²⁸ See Msr.² iii. p. 107, n. 3, and Seeley², p. 81. The passages in question are Cicero, de Rep. 2. 20. 36: Festus, F. p. 344, Sex Vestae: Livy, 1. 36.

²⁸⁸ Msr. iii. pp. 30-32, 91, n. 4, 111, &c.

²⁹ Cicero, ad Fam. cited in § 7, n. 11. I do not think the word princeps

however of these does bear a name Medullanus which, according to Cuq^{29a}, indicates, with five or six similar ones, Etruscan origin.

There does not seem to me anything inherently improbable in the intervention of an outsider, with a following, on the suggested invitation of one or two contending factions, or of both, and his ultimate acquisition of predominance in the joint state³⁰.

The generally admitted Sovereignty of the Tarquins may cause some surprise at the retention of the term *inferior* or *later*, for their adherents. But this might be due to a reaction against the tyranny, in which this dynasty culminated, after their personal expulsion.

The general features of the story indicate, to my mind, an original adoption, by the incomer, as in most Tyrannies strictly so-called, of the popular side, while there are undoubted traces of a very shortly restored aristocratic, or Sabine, superiority in the Republic, which government was originally due to a revolt of both orders. I refer particularly to the remarkable Valerian traditions and the counterinfluence of the gens Claudia in the early Republic.

Patres Conscripti. This well-known style, by which the Senate was addressed in all domestic proceedings of which we have any historical record is almost universally explained to mean patres et conscripti, the Fathers and those enrolled with them³¹. The old formula of summons to the has any technical meaning as head of a family or gens. Mommsen, Sr.³ i. p. 443, n. 2, leaves it unexplained.

^{29a} Cuq, i. p. 45, n. 2. The original form Papisius is simply spoken of as old Latin by Corssen², i. pp. 231, 237.

³⁰ See Pais, Anc. Leg. pp. 134, 135, &c. We may perhaps compare the *Podesta* of medieval Italian history. But the case is not exactly parallel; nor indeed is the interesting generalisation of Hallam (Middle Ages (1853), i. pp. 397, 398) quite borne out, at least by Florentine history (Villari, Hist. Florence, c. 3, §§ iv, v).

³¹ So clearly Mommsen, Msr. iii. pp. 838, 839. I say almost universally, because a passage of Dionysius would seem to make conscripti apply to the

Senate House "qui patres, qui conscripti" favours this separation of the words by indicating two distinct classes. Moreover the conscripti are distinctly stated, by one authority (Festus) for that formula, to be an addition to the original Senate (whence they were also called allecti); patres being, we are told, the proper name for such Senators as were of patrician race³². The latter are the class to which I at present wish to call attention, postponing consideration of the conscripti till I come to that later epoch the commencement of the Republic, when I believe them to have originated. The distinction is an important one, as the auctoritas patrum of which we hear in Gaius, 1. 13 was no doubt the sanction of this patrician part of the Senate.

The reason given by Festus, for the additions of Valerius (which is probably somewhat misunderstood by the copier Paulus), will be discussed hereafter. The acquisition, also, by the Senate, of independent legislative power, which is an important chapter in its history, for the present work, belongs to a much later period than that which we are now considering. For convenience of reference, I add a note of the principal authorities as to the still later supplements or enlargements of the body, but they have comparatively little to do with the development of Roman Private Law³³.

original members of the Senate, the enrolled Fathers, as distinguished from the non-enrolled, perhaps the other heads of families of the original gentes. Dionysius, 2. 12.

³⁵ Festus, F. p. 254. Qui patres qui conscripti vocati sunt in Curiam? Quo tempore regibus urbe expulsis P. Valerius Cons. propter inopiam patriciorum ex plebe adlegit in numerum Senatorum c et LX et IIII, ut expleret numerum Senatorum trecentorum, ita ea duo genera appellata sunt. (Müller's emendations are here adopted.) Also ib. P. p. 7. Allecti dicebantur apud Romanos qui propter inopiam ex equestri ordine in Senatorum sunt numero adsumpti. Nam patres dicuntur, qui sunt patricii generis; conscripti, qui in Senatu sunt scriptis annotati.

** Msr.* iii. pp. 844—853. Suetonius, Caesar, 41 (lex Cassia): Dio Cassius (? the lex Saenia of 28 or 30 B.c.), see 52. 42; Tacitus, Ann. 11. 25 and note of Orelli; also Aurelius Victor, Vespasian, &c., &c.

King and Senate, parallels. The theory adopted in the present volume is, as will be seen more fully hereafter (§§ 11-15), that the Monarchy, absolute or limited, which I regard as historical in the Tarquinian dynasty, was not primeval, as represented in the stories of Romulus and the three following Kings; and that we cannot consider the condition of a fully organised state, or of Sovereignty proper, to have been reached in that legendary period. Some of the elements, however, of such an organisation have been considered as fairly inferrible, even for that early time, from surviving institutions. Such are the Roman family and gens, the latter having been, however, it is suggested more definitely developed after the dispersion of an original invading Host. The distinction of Patrician and Plebeian has been also placed in this class, though with some hesitation. as it may not unreasonably be held to have arisen entirely from the regularisation of the group of gentes, which I myself connect with the attainment of sovereign power, and the permanent combination into a State proper.

Whether the Senate also can be reckoned in the same category of primal elements is doubtful.

Something very like it seems to have existed in other nations, where the only approximation to a Sovereignty, or a State, was a number of isolated local administrations, with an occasional and temporary chieftainship in war³⁴. In the unwarlike Village Community of India, where this institution is regarded by Sir H. Maine as most perfect, the Council of Elders, though sometimes replaced by a Headman, hereditary or elective, appears, in general, to be the original repositary of all authority³⁵.

⁸⁴ See Caesar on the Germans, de Bello Gallico, 6. 22, 23: Tacitus, Germania, 7. 11, 12: generally Stubbs, C. H. i. ch. 2 and Maine's Village Communities.

³⁵ Maine, V. C. as cited above, § 2, p. 22. As to this institution "always bearing a name which recalls its original constitution of five persons," see

But at Rome, whatever may be the true history of the tribunus (see § 6, p. 231 and the subsequent article under this head, § 12), we have no traditional authority to go behind the rex, for the creation of the Senate, or to attribute to it any earlier development of jurisdiction or authority.

Like the Indian Village Council which Maine tells us is "viewed as a representative body," the Roman Council of Elders may have been, from the first, "viewed" as representative of the curiae and gentes. But there is no evidence of any election, such as is alleged for the members of the Spartan γερουσία³⁶. The Roman Senator is, according to almost all our accounts, an appointee by King, Consul, or Censor. Thus, in the early dawn of our own history, the witan, as well as the gesið and the begen, exist rather in relation to the King than to the people. Whether this was to the King, as originally military, and temporary, leader³⁷, and whether the first Roman Senate may once have existed in some similar relation to an original tribunus, are questions of too remote speculation to be dwelt upon further, seeing that the tribunus himself, as thus explained, is purely matter of inference38. As to the substantial power of the Senate, when no longer overshadowed by the King, there is no doubt (see § 10, p. 378); but some of the anticipations of it, by Dionysius, deserve just a passing notice.

He claims for this body, in ancient times, an ultimate veto

also § 1, pp. 22, 23. The Elders of Wales (see § 1, p. 26 and above, n. 5) on the contrary are always the counsellors or judicative advisers of a head, whether we compare them with the appointed Roman Senate, or with the alleged consilium domesticum of Roman family law (§ 3. p. 55).

³⁶ Aristotle, Pol. 2. 9: Plutarch, Lycurgus, 26. The παιδαριώδης character, attributed to this election, apparently only means that it was mostly settled by acclamation. On the strange agreement of the 30 ώβαί with the Roman curiae see next section.

³⁷ See Freeman, Norman Conquest³, i. p. 86 sqq.: P. and M. i. pp. 8, 9.

⁸⁸ Above, § 6, p. 231.

upon the resolutions of "the people," as distinguished from the practice known to himself, in which "the people" had control over the resolutions of the Senate³⁹. This is evidently the auctoritas patrum of the earlier historical Republic. The same author alleges to have been originally required a preliminary approval, by the same body, of any measure which was to be laid before "the people^{39a}." This last condition, which of course would enable the Senate to decide on the form and contents of any intended project of law, is the $\pi\rho o\beta o\acute{\nu}\lambda\epsilon\nu\mu a$, on which there is some degree of doubt in the historical period.

These powers became important, when the formal initiative devolved upon the yearly Consuls, who were necessarily more amenable to the influence of a permanent body like the Senate, and I shall return to the subject on the establishment of the Republic.

But, in the regal period, although the Senate was always a deliberative body, and so far in a superior position to the popular assembly, the opportunity for exercising their powers appears to depend entirely on the will of the King, who is not in virtual dependence on them, as the Consuls (semble) were. Therefore we cannot give much weight, under the true Monarchy, to the part attributed to the Senate, which is obviously drawn, by our main authority, from historical or traditional republican practice.

39a id., 2. 14. 2. τῷ δὲ συνεδρίω τῆς βουλής...περὶ παντὸς ὅτου αν εἰσηγῆται βασιλεὺς διαγινώσκειν καὶ ψῆφον ἐπιφέρειν κ.τ.λ.

³⁹ Dionysius, 2. 14. 3. ὅ τι δὲ ταῖς πλείοσι δόξειε φράτραις τοῦτο ἐπὶ τὴν βουλὴν ἀνεφέρετο. ἐφ' ἡμῶν δὲ μετάκειται τὸ ἔθος κ.τ.λ.

APPENDIX TO § 8

INTERREGNA in republic, early, p. 298. Later, 299. Testimony of Cicero and Asconius, 301. Order and constitution of decuriae, ib. Distribution of gentes and closing of circle, 302. Order and selection of interreges, 303.

Recourse to an interregnum was a matter of constitutional theory throughout the Roman Republic. Livy frequently avails himself of it in his first ten books, and Dionysius is evidently by way of doing the same, when we are suddenly brought up by the gap at the end of his eleventh. In the attempt to draw some conclusion, however, from comparison of the two, as to interregna, I can only find three occasions, none of which makes anything clear about the decuriae of the Senate. That body, as a whole, is often confused with the patricii—evidently meaning the patrician part of the Senate—and the action of one or the other is occasionally spoken of as an election of an interrex, but is not absolutely inconsistent with appointment after a regular order⁴⁰.

Not much can, of course, be made out of these stories of the fifth century B.C. or of the fourth and third either, as to fact, though perhaps a little as to traditional particulars of practice^{40a}. The interregnum appears generally as a patrician,

40a For cases after those mentioned in the last note, see Livy, 4. 43, 51;
5. 17; 6. 1, 36; 7. 17, 21, 28; 8. 3, 17, 23; 9. 7; 10. 11.

⁴⁰ Dionysius, 8. 90 corresponds with Livy, 2. 43, and apparently with Zonaras, 7. 17. c. But there is nothing in either of the latter about an interregnum. Dionysius, 9. 14 corresponds with Livy, 3. 8 and 11. 60—62 with Livy, 4. 7. It is the first and most suspicious of these cases (482 B.C.) in which Dionysius speaks of electing interreges as a more moderate measure than appointing a dictator (see below, p. 300).

or, towards the end of this period, a conservative, measure employed, frequently by manipulation of the auspices, to postpone the adoption of some undesirable change, or the election of some obnoxious candidate. The inexplicable practice, that the postponed *comitia* are never held by the *first interrex*, may have some remote connexion with these objects⁴¹.

More reliance may be placed, at least as to facts, on Livy's account of an interregnum in the comparatively historical date of 216 B.C. This was apparently an attempt to postpone an assembly of the comitia, at which a reforming plebeian candidate, C. Terentius Varro, was obviously likely to be elected Consul⁴². The attempt, of which Polybius says nothing whatever, failed: and Varro lives to be the Roman historians' scapegoat of Cannae, as Flaminius had been of Thrasymenus. The people, however, of his own time do not seem to have judged so hardly of him as the Greek historian43. The facts, as has been observed, are, by this time, more to be trusted than in the half-romancing earlier annals: but of practice we do not learn much, except that here undoubtedly, as probably before, the first interrex is a man of eminence and experience44. This is in favour of an idea which certainly presents itself to the mind in some previous casesthat, however the order of the decuriae might be fixed, the individual was matter of election (see below, p. 302).

Finally, Appian⁴⁵ records an undoubtedly historical case

⁴¹ Mommsen's explanation is different, Sr.³ i. p. 98, n. 2. See also Forsch. i. p. 220, nn. 3 and 4. See also below, p. 303.

⁴² Livy, 22. 34. Cf. Polybius, 3. 106. 1. Polybius also omits the intermediate dictatorship of Veturius Philo. The resigning dictators, of whom he speaks, are Fabius and Minucius (103. 4).

⁴³ Compare Livy, 22. 61 with Polybius, 3. 116. 13. See also Varro's subsequent career down to 200 B.C., Livy, 31. 49.

⁴⁴ C. Claudius Ap. f. Centho Consul 240 B.C. afterwards Dictator (comitiorum causa), 213.

⁴⁵ Bell. civ. 1. cc. 98, 99.

in the proceedings of Sulla 82 B.C., who formally revived the ancient practice. Both Consuls being dead, he himself withdrew from the city, but enjoined the Senate to choose out of their number "the so-called interrex." They chose Valerius Flaccus, "expecting him to proceed to the election of Consuls." But Sulla directed Flaccus to lay before the popular assembly his (Sulla's) opinion that, for the present, the election of a dictator would be more profitable for the State, a practice which had ceased for 400 years 46; the term of office to last until the dictator should have settled the disturbances of Italy and the State. The dictator, of course, was to be Sulla himself.

This highhanded proceeding tells us little or nothing of the original structure of the Senate. Flaccus is merely the creature of Sulla⁴⁷; and the definite article the interex does not necessarily imply any fixed first representative of a decuria, but merely the regular or proper interex: it is quite reconcileable both with a routine order, from which the first interex was to come, and with election within that body (above, n. 15 and below, p. 302).

On the other hand, in the disturbed period just before the virtual end of the Republic—the year 52 B.C., of Clodius' death and Milo's trial—the interregnum was used, by the aristocratic party under the influence of Pompeius, for its old purpose of postponing or preventing an undesirable consular election. It was a long one, lasting six months⁴⁸. The main information that we get, from the contemporary

⁴⁸ It is not worth while to go into Appian's rough chronology, particularly this inexplicable 400 years, which would take us back to Numa or Tullus. Plutarch (Sulla, c. 33) more correctly says that this use of the office was resumed after 120 years, referring apparently to the dictatorship comitiorum habendorum causa of Servilius in 202 B.C., Livy, 30. 26, 27.

⁴⁷ He appears, in fact, on the *Fasti*, as his magister equitum, but is called interrex by Cicero (de l. agr. 3. 2. 5).

⁴⁸ Dio Cassius, 40. 45. See generally Merivale, Roman Empire (1865), ii. pp. 32—37.

testimony of Cicero, is that every *interrex* must be a Patrician, and nominated by a Patrician⁴⁹.

The note of Asconius on Cicero's speech for Milo does give us some further particulars of the *interregnum* in practice, though not perhaps bearing directly on the oldest constitution of the Senate⁵⁰. The intervention of the *tribunes*, for instance, if there is any truth whatever in the Republican institution of that office, must be left out of an enquiry as to the Regal period⁵¹. On the *order*, if any, of the *decuriae* and, as between themselves, of the members of each *decuriae*, and the rule as to their successive enjoyment of regal power, I have referred above (n. 17) to the suggestions of Mommsen, which, I must confess, do not appear to me entirely satisfactory⁵².

Order and constitution of decuriae. The following is all that I can conclude or suggest, as to the constitution of the original Senate, from the provisions of the lex Ovinia, and our scanty information on the difficult subject of interregnum. Among the inferences drawn above (p. 284) from the language of that lex, I wish at present to emphasise this: that in practice the Censor must most probably have had some fixed order of the curiae to follow in his lectio senatus "curiatim." Again, from our historical or traditional accounts of the old Senate and the interregna we have thus much established (without the particular fables about Romulus' demise and the appointment of his successor).

⁴⁹ Cicero, de domo, 14. 38. I adopt with Mommsen (Msr. ³ i. p. 653, n. 1) the reading *patriciis*. See too Livy, 4. 43. Coire patricios (ad prodendum interregem) tribuni prohibebant.

⁵⁰ Asconius, in Milonianam, cc. 27 sqq., 87, 46 &c., which agrees on the whole with Dio Cassius, 40. 49. The account given by Appian (Bell. civ. 2. 22, 23) is concerned more with the general result of the tumultuary state of things after Clodius' death than with the constitutional questions of interregnum.

⁵¹ And, with it, the real interpretation of the obstatores essent, Asconius in Mil. 32 (see Msr. ³ i. p. 655, n. 2). Does his stata res esset mean "it was already a settled matter"?

⁵² See too Forsch. i. p. 231, n. 19.

That the Senate under the Kings was exclusively patrician. and that it was only to the patrician part of it that the peculiar right or custom of interregnum descended. δεκάς or decuria had originally its proper meaning of ten men, the Senate being at first one hundred. That the Senate. while still patrician, was increased, perhaps to an intermediate two hundred, certainly to an ultimate three hundred. Henceforth it is supposed by Mommsen that $\delta \epsilon \kappa a s$ became a tenth part of the increased number, and that the Senatorial decuria retained that meaning after it was supplemented by Plebeians⁵³. This is probably true, in spite of the deviation from the proper meaning of decuria (above, § 8, p. 285) as to this and other usages of the Senatorial division so called. e.g. for the selection of iudices 54: for the decuria, as employed to constitute an interregnum, it continued to represent the curiae of the original curiate constitution, and the patrician gentes comprised in them. The order, which it is presumed must have been followed by the Censor in the historical lectio senatus, was probably that of the curiae in the original constitution and also that followed by the patrician Senators when they proceeded to publish (prodere) the first occupant of an interregnum: the individual may well have been matter of election. Whether there was any order of gentes, following the original drafting of the gentes into curiae, we cannot say. The gens Valeria, to which Flaccus, the mouthpiece of Sulla, belonged, was an important and leading one in the reformed constitution of the Republic, which may have been to some extent a restoration of the state of things before the tyranny.

Distribution of gentes and closing of circle. In the symmetrical distribution of these gentes, ten to a curia, I have ventured to suggest the hand of a Sovereign, applying the

⁵⁸ Msr. 3 i. p. 656, n. 3; iii. pp. 851, 852.

⁵⁴ ib. iii. p. 529, n. 2.

analogy of an old division of a Host, to a Polity now consisting of three tribes. To the same artificial arrangement I consider to be due the closing of the circle of patrician gentes and possibly an order of the curiae and the gentes within them. I wish to state these assumptions plainly, and subject to all the objections against building on hypothesis, and confusing the proven with the unproven: but I would remark once more that authors who speak as Mommsen does of "the Curiate Constitution" must either make some assumption of the kind, or accept the stories of Romulus. To the previously urged improbabilities of gratuitous subdivision, I may add, à propos of the present subject, that, in the accounts of his Senators dividing themselves into decuriae, I fail to see any intelligible object or reason for such division taking place at all, on their initiative.

Difficulties as to order of interreges. As bearing upon the suggested original order of the curiae, and the gentes in the curiae, I have referred above (p. 299) to the curious fact that the postponed comitia, to be held after an interregnum, could not be held by the first interrex, as unsatisfactorily explained by Mommsen. I must confess, however, that I have nothing very definite to suggest by way of explanation of this, and of the various different expressions that we find with regard to the appointment of interreges, e.g. (1) selection by lot, (2) election, (3) nomination of his successor by each successive interrex. The interregna are mostly cases of strong party division, and at the same time of attempts to tide over an impasse, by reconciling such divisions, without having recourse to the extreme measure of a dictatorship (see above, pp. 299, 300). The holding of the postponed comitia was, I presume, considered as probably having some effect upon the election itself; and it may have seemed that there was more chance of mutual agreement if this power was placed in the hands of an ultimate settled

mediator rather than in those of one who was to some extent a person fixed by routine. But it is the suggested drafting of the original gentes into curiae for purposes of representation in the Senate which I consider to have more to do with my present enquiry into the original constitution of that body, than the subsequent use and practice of interregna in the party differences of the later Republic.

§ 9. THE CURIA

Constitutional position of: Mommsen and Jhering, p. 305. Original motive and character, 306; Importance of subject, ib.; Traditional division of Romulus, 307. Suggested pre-Servian regulation, 308. Religious object, Festus, ib. Curiones, 309. Flamens, ib.; Fordicidia, 311; Curia the house of worship, ib.; Curial festival compared with phratric, 312. Difficulty of numbers, &c., 313; Military explanation of φυλή and φρατρία, 314. Patrician constitution of original curiae, 316; Admission of Plebeians, 317; Suggested solution, 320; Names of old curiae, ib.; Agnus curio, &c., 322; Fornacalia, 323. Identification of curiae with Servian tribes, 324; Conclusion, ib. Montes, pagi and sacella, 326; Argei, 327; No internal government in any of the elements hitherto treated, 329; Number and distribution of Argean chapels, 330. Appendix, 332.

I now pass to the first element of national or political association, at Rome, which is not expressly based upon relationship or descent, whether real or assumed. Mommsen accordingly makes the *curia* belong to *Staatsrecht*, the Family and the *gens* to *Privatrecht*¹.

Jhering on his part too distinguishes the co-ordinating element of the two latter institutions from the sub-ordinating or military element, to which he attributes the curia, Tribe, tribunus and King².

I doubt, as has been already said, whether the distinction between Constitutional and Private Law is of very much importance in early times, or very possible to draw. The

Mommsen, Sr.³ iii. p. 91.
Jhering⁵, i. pp. 178, 183.

gens is certainly not without considerable bearing on the former branch; and Dionysius would rather seem to class the curia, as analogous to the Greek $\phi \rho a \tau \rho ia$, under the latter.

The original motive and character of the curia are anyhow of considerable importance, not only as throwing light upon the earliest constitution of Rome, but from their connexion with some of the earliest facts of her Private Law (see § 5A, p. 220 and § 10, pp. 382, 383).

The curia, though clearly interwoven, in Roman Law, with the Senate, is, as has been intimated above (§ 8, p. 283) not quite so general a phaenomenon as the latter. It is not, however, an institution peculiar to Rome, but possibly common to the whole Latin race³, and certainly to part of the Grecian (see Appendix). Being attributed to Romulus, it dates, of course, from a time before any authentic history, but it yet remains, in at least formal existence, down to the close of the Republic, or even to the time of Gaius: for arrogatio, which involved a representation of the curiae, is certainly spoken of by his Institutes in the present tense as a matter of surviving practice⁴.

³ Msr.³ iii. p. 90, n. 1. So at least I gather from the latter part of his note; the institutions mentioned in the former part are mere copies of Rome.

⁴ Gaius, 1. 98, 99, cf. 100. This argument (valeat quantum valet) is at least supported by the alteration found necessary in the corresponding passage of Justinian (1. 11. 1). On the contradiction between Gaius, Inst. 1. 101 and Gaius, Dig. 1. 7. 21, see Sources, p. 125. The reason, somewhat loosely given by Gaius (nam id magis placuit, Inst. 1. 101), for the original incapacity of women to be arrogated, is more correctly stated in Gellius, 5. 19. 10. The principale rescriptum, therefore, by which the lex curiata, as the form of arrogatio, was superseded (Poste's Gaius⁴, p. 65), and a fortiori the Regulae of Gaius, would seem to be later than the very full account in this chapter of Gellius. His date, however, is somewhat doubtful (Sources, p. 93, n. 23), and he may speak merely as an antiquarian—an argument which can also be sometimes employed against the language of Gaius himself.

Romulus' division. According to our principal Roman historians the curia is an artificial subdivision—a tenth part of each of Romulus' three tribes-being itself again divided into decuriae or decads. The original object of this sub division, we are told, was military service, and the assignment of land6; its secondary object political action7, and religious service8. I may here sum up or reiterate my arguments against this division, considered as an original arrangement. It appears to be retained by Mommsen, as such, and I am aware of the presumption shewn, in differing from so great an authority. But, while a military division by tens and hundreds appears to be a natural and probable thing for an invading host, I venture to think that the introduction of the factor three is better accounted for by the addition of a third tribe, and the subdivision less likely to be the somewhat gratuitous fancy of a questionable founder, than the policy of an established sovereign, with views of order and symmetry in his new kingdom, see § 5, pp. 170, 171; § 6, p. 236; § 15, p. 472.

Jhering's view does not differ very materially from that of Mommsen. The curiae are with him divisions of the People as a Host, accounted for by the needs of War⁹. His derivational explanation of the word is, however, more reconcileable with the idea of the curia being primarily a combination of smaller units—the gentes—than a division of a Tribe. It is, according to him, the conviria or association of men¹⁰, containing ten of the smaller divisions decuriae, each of ten warriors. Each decuria answered, in the military organisation, to a gens, and the original motive for the combination of the gentes he finds in the interest of a military

⁵ See § 8, p. 285 and Msr. ³ iii. p. 99, n. 1.

⁶ Livy, 1. 13: Dionysius, 2. 7.

⁷ Dionysius, 2. 14: Pomponius (Dig. 1. 2. 2. 2) seems to make this the sole object.

⁸ Dionysius, 2. 23. 9 Jhering⁵, i. pp. 116, 247, 250. 10 id. p. 250 20—2

constitution¹¹. This identification of decuria with gens has been sufficiently considered already¹².

Suggested Pre-Servian regulation. Now it is not at all improbable that the curiae which, as we shall see (pp. 317-319), appear to have soon attained an undefined local signification, extended from what will be taken as their original one, may have been utilised and their own number, as well as the number of their constituent parts, regulated, in a military organisation later than that of the original Host but earlier than that of the Servian system¹³. A still more recent political application may certainly be inferred if not distinctly proved14. But the bond of union in the first approach to a Roman Polity, as distinguished from a merely military following, I believe to have been a common Religion; traces of which character, in the curia, survive even in the African inscriptions of the third century A.D. quoted by Mommsen; who, however, himself considers this institution to be properly political and only accidentally religious. See App. p. 355.

Festus. An entirely different view, from that of the historians, as to the original object of the *curiae*, is in fact expressed by some of our best Roman antiquarian authorities, who distinctly state that the *curia* was primarily a *religious* association. The Roman *curiae*, were, according to Festus¹⁵, "places appointed for the transaction of the business of the thirty Romulian divisions of the Roman people, afterwards increased to thirty-five (for this confusion with the Servian tribes see p. 324 and § 16, pp. 513 sqq.), that each in his own

¹¹ Jhering⁵, i. 205.
¹² Above, § 5, p. 170; § 8, p. 285.

¹³ See above, § 6, p. 251, and below, pp. 315, 316.

¹⁴ Mommsen, Sr.³ iii. pp. 101,125. The Headmen of the *curiae* referred to in C. I. L. viii. 1827, 1828 are nominally still religious, though discharging minor economical functions over local areas. See below, App. pp. 346 sqq. as to the historical Attic $\phi \rho a \tau \rho la\iota$.

¹⁵ Festus, P. p. 49. Curia...ut in sua quisque curia sacra publica faceret feriasque observaret.

curia might observe public rites and holidays." The new curiae were buildings afterwards erected, near the compitum Fabricium, the old ones not being large enough, which were made by Romulus, when he divided the people and their rites into thirty parts, with the intent that in those buildings they should care for those rites: "these however being left, on account of religious scruples, in four (see next note) cases, when the rest were called forth from their old habitations to the new ones." These four cases will be further considered hereafter. With the false derivation from curare, which appears in Varro more than once.

The Curiones, mentioned as Cusianes¹⁸ in the ancient Salian hymns—an evidence, in itself, of their great antiquity—were, according to Varro, Priests called curiones from the curiae in which they were to officiate¹⁹. It would appear that certain Flamens, also of priestly character, belonged to the curiae, possibly, in their original conception, as inferior officers²⁰. The post, on the other hand, of head curio (maximus) was retained in the possession of the

¹⁶ Festus, F. p. 174, Novae. On the veteres curiae, whether seven or, as altered by Augustinus, Ursini, Scaliger and Müller, four, which were left (see Msr.³ iii. p. 101, n. 2 and below, p. 311), all that we can make out for certain from Tacitus, Ann. 12. 24 is that they were on a slope of the Palatine, perhaps rather on the south side than towards the Caclian. The site of the Compitum Fabricium is not known. It would not seem to have anything to do with the pons of that name, which was built and derived its title from its builder, quite late in the Republic, 62 B.C. (Burn, Rome and Campagna, p. 265, n. 3).

¹⁷ Varro, L. L. 5. 155; 6. 46. See also Mommsen, Hist. (Dickson, 1901), i. p. 85. He calls the curia a "wardship."

¹⁸ Varro, L. L. 7. 26, where IAM CVSIANES is certainly to be restored, IANI CVSIANES.

¹⁹ Varro, L. L. 5. 83. Sacerdotes universi a sacris dicti...Curiones dicti a Curiis, qui fiunt ut in his sacra faciant. These are the *Curionia Sacra* of Festus, P. p. 62, and the priest's allowance for the sacrifice is the *curionium aes* (ib. p. 49 and Dionysius, 2. 23). For the comparative unimportance, ultimately, of these posts see p. 330.

²⁰ Festus, P. p. 64, *Curiales*: Varro cited by Dionysius, 2. 21. See Msr. i. p. 390, n. 3 and iii. p. 101, n. 5.

Patricians until 209 B.C., nearly a hundred years after the lex Ogulnia²¹. Perhaps, however, this may be considered as much an argument for the unimportance, as for the importance of this old dignity.

Flamens, originally, by their name²² sacrificial assistants, were, with the exception of the three "greater²³," who remained patrician down to Gaius' time, of various dignities. Those who are specially designated *minores* were not all mere servitors, as Mommsen, I think, rather seems to indicate^{23a}. Some were the priests proper of comparatively inferior Deities, either as having become less popular objects of adoration than they had been, or as the deification of special attributes of the original nature gods; some are possibly only local. These I think constitute, in their total, the remainder of the fifteen mentioned by Festus²⁴; whose names can mostly be explained by the above different descriptions.

Of the two which I take to be *local*, one, however, has the kind of subservient office hinted at by Mommsen²⁵.

²¹ Livy, 27. 8. Inter majorum rerum curas, comitia maximi curionis... vetus excitaverunt certamen.

²² See Corssen², i. pp. 146, 639 ("Verbrenner"): also ii. p. 86* on Schuchardt's revival of the old erroneous derivation from filamen (Varro, L. L. 5. 84).

²³ Gaius, 1. 112. Festus, P. p. 151, Majores. The three of course were the Dialis, Martialis, and Quirinalis. See Festus, F. p. 185, Ordo Sacerdotum.
²³⁸ Msr. ii. p. 26; iii. p. 567.

²⁴ Festus, F. p. 154. Maximae dignationis Flamen Dialis est inter quindecim Flamines. Of the remaining twelve after the three majores ten can be made out: Volcanalis (see Macrobius, 1. 12. 18), Furinalis, Falacer (? Saturnian), Volturnalis, Floralis, Pomonalis (Varro, L. L. 5. 84 and 7. 45), Carmentalis (Cicero, Brutus, 14. 56, see above § 5, App. I. p. 181), Portunalis (Festus, F. p. 217), Palatualis (cf. Varro, L. L. 7. 45), Cerealis (C. I. L. xi. 5028). See Müller's note, p. 385, to the above cited passage of Festus, and Wissowa, Religion und Kultus der Römer, p. 432, n. 8.

²⁵ See Msr. in my n. 23°. The two intended are Palatualis and Portunalis. The form of the first is curious, if connected with the mons Palatinus: but it is really formed in all probability from the later imperial residence, Festus,

Another, or his patron the goddess Furrina, whom one cannot help connecting with the threshing floor, presided over the ancient Curiate festival, on which I shall have to speak hereafter, and the Greek family gathering to which it bears so extraordinary a resemblance (below, pp. 312, 313 and 326). In leaving the subject of the minor Flamens, I should say that a natural endeavour (see above, p. 309) to identify some of them with officers of the individual curiae has not met with success, in the attainment of any evidence, or ground for reasonable inference.

Fordicidia. A propos of what seem to be ancient agricultural celebrations of the curiae, I may mention a grotesque and inhuman sacrifice to Tellus, which was still, in Ovid's time, performed "in the curiae"—most probably the veteres—by the Pontiffs. This was the Fordicidia, an offering of thirty pregnant cows, retaining obviously the old number of the alleged Romulian division²⁶. This and similar observances afford considerable support to the testimony of Festus, that the curia was primarily a religious institution.

Curia the House of Worship. Modern philology combines with ancient ceremony and tradition to recognise, in the original *curia*, under its old form *cusia*, the House of Worship, and also, as we shall see of rustic Festival²⁷. The

F. p. 245, s.v. The *Portunalis*, although clearly styled from the port on the Tiber (Varro, L. L. 6. 19), has apparently only to *tar* the arms (probably the wooden shield) of Quirinus' statue (Festus, F. p. 217, *Persillum*).

²⁶ Varro, L. L. 6. 15 and Ovid, Fasti, 4. 630-635. Cf. curia prisca, ib. 3. 140. The singular is probably used, as Paley suggests, from mere metrical necessity. The opinion has been held, I think erroneously, that the curiae had been combined into one. They may however have been separate chapels under a common roof.

²⁷ See p. 326. It will be seen that I accept Corssen's very interesting derivation of the word (i.² p. 32): it is contested by Mommsen (Msr.³ iii. p. 90, n. 2) mainly on the ground of want of sufficient evidence for this particular process of s to r. Surely, the general statement of Varro in L. L. 7. 26, with its special reference to the extract, which he gives, from

ancient gathering, to which I have shortly to refer, particularly when considered in connexion with its Greek parallel, takes obviously, in the conception of its describer, a family character, which makes the curia an important link or step between Private and Public Law (above, p. 305). It is in general connexion with this Greek parallel that I propose for the present to speak of the Fornacalia, leaving the more particular consideration of that festival to the end of the section, and that of the Apaturia to the Appendix.

Curial festival compared with phratric. Dionysius though he sometimes appears to regard the alleged division into curiae as primarily military (see § 5, pp. 156, 170), proceeds, in another part of his encomium on Romulus, to treat them as organised by him for the performance of common sacra, on behalf of the State, in addition to those which belonged to the family priesthoods²⁸. He accordingly describes a sacrifice and banquet, held down to his own time, in a common hall, still named the curia. This institution he supposes Romulus to have borrowed from the Lacedaemonian discipline or education $(a\gamma\omega\gamma\dot{\eta})$ of Lycurgus, which was in fashion at that (Romulus') time, referring particularly to the $\phi\epsilon\iota\deltai\tau\iota a$ or comrades' mess, which was equalled in homeliness by the Roman feast in Dionysius' time, at least as far as the repast set out for the gods²⁹.

These φειδίτια are no doubt the συσσίτια mentioned by

the Salian hymn (above, n. 18), of which Müller's very probable emendation is expressly accepted by Corssen² (i. pp. 229, 230 n.) might be allowed as sufficient. As to the primary object of the curia we may compare the Attic parallel τὸ δὲ ἰερὸν, εἰς δ συνήσσαν (οι φράτορες) φράτριον ἐκαλεῖτο, Pollux, 3. 4.

²⁸ Dionysius, 2. 21. 2: Festus, F. p. 245, *Publica sacra*. I do not think this account at all precludes the possibility of the public rites having *originated* in the private. On the question whether the two persons specified by Dionysius, or his authority Varro, were *curio* and *flamen* or not, see Msr. i. p. 390, nn. 2, 3.

²⁹ Dionysius, 2. 23.

Herodotus^{29a} and this comparison holds to some small extent with the Dorian system. But the curia is throughout translated, in Dionysius, by the Ionian $\phi \rho a \tau \rho i a$, and his account of the Curiate festival is evidently written not so much with a view to the grim austerity of the Spartan mess-room as to the kindly family gathering under the Athenian phratric system³⁰, on which I can only allow myself a very short digression here, as it is compared more fully with the Latin Curiate system in an Appendix.

Difficulty of numbers, &c. Among the many resemblances between the elements of national association in Greece and Italy, that of the φυλή and φρατρία to the tribus and curia is among the most striking. And a common arrangement by triads, if a genuine antique, is one of the chief difficulties to anyone who attempts, like the present writer, to read some traces of historical truth in the early legends of Rome. My view, as hitherto expressed, has been to regard the Roman Polity as primarily Dual, and only subsequently and accidentally a Triad. The scheme of thirty curiae, and the distribution of existing gentes between them, in fixed numbers, I have ventured to take as an artificial arrangement, being the first attempt at a Constitution, by some legislator, in quasi-historical times, dealing with units, in which one or other of three national characters predominated, but at the same time combining with these the traditional decimal divisions of an invading

²⁹⁸ Herodotus, 1. 65. The directly warlike object of this institution is confirmed by Plato, Legg. 1. p. 625 E. It is not so obvious in the other names of $\phi\iota klr\iota a$ and $\phi\iota sllr\iota a$ (spare meals). The last feature is, in the Roman gathering, merely a remnant of ancient rustic simplicity. On Photius' identification of the $\tau \rho\iota \eta \kappa a$ (Herodotus, l.c.) with the $\gamma \epsilon r \sigma$ of the Athenian phratric system, see App. pp. 335, 349 n. 150. It is most probably an entire mistake.

³⁰ There can be no doubt about this being the true character of the Apaturia, to anyone who reads the deplorable sequel to the victory at Arginusae (Grote, Hist. (1888), vi. p. 413); see below, App. p. 344.

Host. The probability of such nice equality of numbers having ever been produced "by legislative constraint operating upon pre-existing natural elements" is questioned by Grote, when treating of the similar case in the Athenian Constitution: its maintenance he regards as impossible³¹.

It seems to me, nevertheless, more probable that some such arrangement might originate in the mind of one man, and even subsist generally as a scheme or pattern, than either that there should be an *automatic* combination of natural (family) units in certain favourite numbers, like that of chemical "equivalents" which was the view I once held³²; or the, to my mind, self-contradictory aggregation theory of Grote³³.

It is therefore to a definite personal recasting, of originally self-formed materials, after the addition of the third tribe, that I now attribute the fixation of the circle of patrician gentes, the drafting of them ten to each curia, these again ten to each tribe, and the ten witnesses to confarreatio (see above, § 3, p. 77 and § 8, p. 291).

In support however of what we may call the automatic theory of the Curiate and other systems, may no doubt be urged, besides the general argument of Professor Goudy (n. 35), certain definite statements as to early Greek history which are said to be accredited by writers of a fairly accurate character, like Aristotle and his pupil Dicaearchus. These will be considered in the Appendix to this section.

Military explanation of φυλή and φρατρία. Referring to the theory of the *curia* as originally a military institution (above, p. 307), we may note that there *are* traditions

³¹ Grote (1888), ii. p. 428, cf. Msr.³ iii. p. 92, n. 1. My own arguments for a post-Romulian, or at least pre-Servian, revision are summed up above, p. 307.

⁴² And which seems rather to be that of Mommsen, Msr. i. p. 28; iii. pp. 99, 100. Karlowa (i. pp. 34, 35) in speaking of the geschlossene, einmal anktionierte rezipierte Zahlof the gentes, and suggesting provisions for keeping up the normal number, seems to assume an original settlement of some kind.

³³ At least as stated by Rawlinson, Herodotus³, iii. pp. 306, 307, with whom, in his general criticism of Grote. I incline to agree.

of a time when an organisation of Greek military expeditions, by φυλαί and φρατρίαι is suggested as a reality34. This suggestion, in which φρατρία apparently retains its original sense of relationship rather than that of voluntary association, involves no great stretch of belief: it is indeed, more intrinsically probable than my suggestion of an original marshalling by the "natural" numbers ten and hundred (see however § 5, App. IV). It is the parallel recurrence of the number three, and its multiples, in what passes for early Greek history, which more particularly demands our attention. For it seems to reopen the whole question of the Latin tribus, with all that hangs upon it, and upon its rejection, as entering into the first beginning of Rome, which has here been conceived as dual. That conception, and my whole theory, would, I must admit, be seriously open to question if a detailed system of triads could be shewn to have arisen in early Greek Constitutional Law, similar to the Roman, and out of the same tendency to trichotomy. This tendency I cannot, in face of Professor Goudy's article35, venture positively to deny: but I think it is rather a matter of literary or philosophic fancy, comparatively late, than a law of crystallisation among the remote elements of old nationality. This general opinion, however, is scarcely enough.

An examination of the closest Greek parallel, which is usually compared with the Roman Curiate system, is given in an Appendix. On the whole I do not see sufficient ground for altering my belief that the Roman system is a secondary artificial rearrangement, which I am myself rather disposed to attribute to the intervention of Etruscan principles acting

³⁴ Hom. II. 2. 362, 363 cited by Leist, Gr.-Ital. Rg. p. 110. I think the $\phi \rho \dot{\eta} \tau \rho \eta$ here is treated rather more as a natural than an artificial association, but see the reasoning below, p. 347, on $\dot{\alpha} \phi \rho \dot{\eta} \tau \omega \rho$, also, pp. 350, 351. The $\dot{\epsilon} \nu \omega \mu \sigma \iota \dot{\alpha}$ of Lycurgus' constitution is purely artificial.

³⁵ See his interesting Trichotomy in Roman Law, pp. 10-16.

upon a groundwork of Latin and Sabine³⁶. As to any Greek pattern, I venture to suggest a converse to Pais' continual allegations of Greek incident being copied in Roman legendary history. It seems to me by no means improbable that some of the details of the rather apocryphal early Greek Constitutions are really due to traditions of Roman (see Appendix, p. 345).

Patrician constitution of the original Curiae. That the first curiae were composed of gentes, and Patrician, is rather a matter of conclusion from various separate indications than of the categorical statements which we find in modern historians. Many of the indirect evidences to this effect are to be found in the practice and province of the assembly called by their name, of which I have to treat at more length presently.

I may here single out for notice as to the first point (1) the voting of that assembly as stated in an important passage of Gellius, or rather Laelius Felix (see Sources, p. 126), to have been taken ex generibus hominum, which can scarcely mean anything but some sort of marshalling by gentes³⁷: (2) the fact that one of the principal functions of the same assembly, down to its latest days, was to take part, whether very actively or no, in the maintenance of gentile sacra and the family successions with which that maintenance was connected.

That the ten witnesses to confarreatio represent the ten curiae in a Tribe is merely a matter of hypothesis, and though a very probable hypothesis, can scarcely be relied on as direct evidence for the gentile or patrician character of the curiae.

³⁶ See Festus, F. p. 285. Rituales nominantur Etruscorum libri in quibus praescriptum est quo ritu condantur urbes...quomodo tribus curiae centuriae distribuantur, &c.

^{. &}lt;sup>37</sup> A. G. 15. 27. 4. The probable reason for the unusual expression (*generibus*) is well given by Mommsen, Msr. ³ iii. p. 9, n. 2 ad finem and p. 90, n. 5.

Admission of Plebeians. As to the latter point, that the curiae were predominantly patrician, but not exclusively so, in the earliest time, seems to be, on the whole, the more probable view. It is stated by Livy that the head of the Curial Priests (the Curio Maximus) was never elected from the plebeian order till after the year 209 B.C.38 other hand, at a date in all probability considerably earlier (see above, § 8, p. 284) we find the Lex Ovinia enacting that the members of the Senate are to be selected ex omni ordine This difficult law will of course be considered more fully hereafter, but the above words would appear to shew that, at the time of its enactment, while the Senate is clearly considered as connected with the curiae, the latter cannot have been confined to one order. We must also take into account the statement that, at the beginning of the Republic, the first Plebeian tribunes were elected at a Curiate assembly, and the fact that at the end of the Republic or early part of the Empire, we find the very poor taking their share in the Curial festivals.

In the face of the former of the two last statements, if it has any historical foundation, it seems impossible to maintain, with Niebuhr³⁹, that the early curiae were exclusively patrician. The view now, I think, finding more favour is that the first assemblies of the populus—the comitia curiata—did from the outset, as our Roman historians lead us to believe, include Plebeians. There are great difficulties in either view, the more striking of which will now be briefly considered.

Plebeians in curiae. The original Plebeians, whether Clients or not, were, according to Mommsen, scarcely in possession of full citizens' rights, though they in some degree belonged to the Roman Community and enjoyed

³⁸ Livy, 27. 8.

³⁹ Mommsen, Msr. 3 iii. p. 93. See generally § 10, below.

the protection of its laws 40. I have endeavoured to shew (§ 7, pp. 268, 274) how and to what extent they might gradually become members of *gentile* associations. I now proceed to enquire how they became, as they apparently did become, members of *curiae*, and with what powers or allowances.

Mommsen, as we have seen, takes it that they were all originally Clients, being, as such, members, in some sense, of the *gens* of their Patronus, and therefore *ipso facto* the members of some *curia*, the *curiae* being made up of the *gentes* ⁴¹.

A comparatively inferior position is accordingly still attributed by him to the Plebeian members of the earliest curiae as to the proceedings of these bodies. He seems to hold that such members might use the services of a Curiate assembly for purposes of Arrogatio (see § 5, p. 162 and § 7, p. 269) but probably for little more—that in particular they had no definite voting power in the Comitia Curiata till probably as late as the third century B.C.⁴²

Mommsen's view, as to the comparatively late acquisition of this power, cannot at first sight be reconciled with our accounts of the first election of Plebeian Tribunes, which is stated, by our authorities generally, to have been held fifteen or sixteen years after the establishment of the Republic, and, by a majority of these authorities, expressly to have been made at a Curiate assembly 43. The latter

⁴⁰ Msr. 3 iii. pp. 54, 66.

⁴¹ Above, § 7, pp. 268—270, particularly as to his account of the subsequent formation and admission of Plebeian *gentes*. Cf. here Karlowa, i. p. 36, nn. 3, 4 and 37, n. 2 as to the recognition, or otherwise, of Plebeian *stirpes*. See however § 7, p. 272.

⁴² Msr. iii. pp. 93, 94 and above, p. 277.

⁴³ Dionysius, 6. 89: Cicero, pro Cornelio, i. Frag. 48 (Müller). Livy, 2. 33, is very doubtful about the first creation generally, and silent on this particular.

statement I take, pace Pais, to represent a tradition most probably based on some historical truth⁴⁴.

Having regard to the object and result of this particular assembly we cannot but conclude that the voters must have been in a largely preponderating degree, if not exclusively, plebeian. Yet the number of recognised plebeian gentes at that time, if any, must have been small. That plebeian clients of the patrician gentes composing the curiae voted as of right at such assemblies is obvious, because their exclusion was the object of the introduction of the new tribal assembly for the election of Tribunes. On the other hand, the fact of their exclusion being so soon contemplated, and effected, shews that they could not have constituted a majority of the Plebeians. We may therefore conclude that a very considerable mass of the lower Order, unconnected with patrician gentes, had found their way into curiae, in some sense of the word, by the beginning of the Republic.

It was, I presume, partly to account for this difficulty in the tradition of the early election of plebeian Tribunes that Mommsen originally assumed a definite extension of the Curiate system, about the time of the establishment of the Republic, so as to include the whole Plebeiate 45. This does not appear to be reconcileable with his more considered later language as to the originally Patrician-gentile constitution of the curiae (patrische Gemeinde)—at least of the Curiate assembly—and the necessarily gradual process of recognition accorded to plebeian gentes 45a.

In fact the whole question of this recognition of plebeian gentes, and their assignment to curiae, is almost a matter of pure hypothesis. I can only venture to diverge from it

⁴⁴ Msr.³ ii. pp. 278, 279; iii. pp. 151, 152, 321. See more fully, in a later part of this work, the section on the tribunate of the plebs.

⁴⁵ Mommsen, Hist. (Dickson, 1901), i. pp. 328 sqq.

⁴⁵a Msr. iii. pp. 67, 75. See however also ib. p. 206.

by suggesting an entirely different one, which has however a little testimony in its favour.

Suggested solution. The best solution of the difficulty about the first election of tribunes appears to me to lie in the practical or popular extension of the word curia to indicate the secondary meaning of district. To this local meaning of curia Mommsen does advert 46, but does not, I think, give it sufficient weight. It is surely a not unnatural transition from the religious meeting-house to the locality which it may have, in a general way, served.

Names of old curiae. Of the older curiae, some bore names obviously local, some as obviously gentile, an argument which has been used above in favour of an original joint-residence of gentiles generally 47. The district in which the naming gens originally stood, might no doubt come to number amongst its inhabitants other persons than members of the gens, and their clients.

It is clearly owing to this secondary sense of the word that we find below statements of the curiae being, at some later period, increased in number and identified with the thirty-five local tribes 48. And this vague local character seems to me the best explanation of the Feast of Fools described by Ovid (see below, pp. 325, 326), with its inclusion of the poor and uneducated. At present I must conclude with a few words on some of the names of the old curiae, which may bear out the above hypothesis.

⁴⁶ Msr. 3 iii. p. 94. See below, p. 325.

^{47 § 5,} p. 146.

⁴⁸ See Festus, P. p. 49, Curia, and below, p. 324, n. 67. This identification has been shewn by Mommsen, Sr. iii. pp. 99, n. 3 to be a mistake: but it is, I suggest, rather in the vague signification of the curiae proper as local districts, than in their definite admission, at an unknown period, of non-gentile or non-patrician persons, that we are to find any satisfactory explanation of the above difficulties. Compare the Attic case, App. p. 341.

Of the four names which are recorded by Festus 49-Foriensis, Rapta, Veliensis and Velitia-three are clearly local. The second, whatever its real original meaning, probably gave rise to the story of the thirty curiae being named after the thirty ravished Sabine ladies who so satisfactorily reconcile their Roman husbands and Sabine parents⁵⁰. This story is rejected, not only, as we see, by Varro, but by the gossiping Plutarch⁵¹, on the ground of the names of the curiae being, at least in part, local. obscure Tifata is apparently that of the Oak-wood which possibly lay once between the Tiber and the high ground of the Janiculum⁵². On the other hand Titia⁵³, no doubt another of the seven old curiae, of which only four are mentioned by name in Festus as cited above (nn. 15, 16). Faucia⁵⁴, Acculeia⁵⁵, and Pinaria⁵⁶ are apparently named after gentes (the last one of known patrician character), no doubt from the original situation of their lands.

The Curia Calabra (which has a history to be separately considered) is said by Festus⁵⁷ to be only concerned with

49 Festus, P. p. 49, Curia; F. p. 174, Novae Curiae.

50 Festus, P. ib.: Livy (with some doubt), 1. 9, 13: Dionysius, 2. 44—46. The latter, too, goes on to quote Varro for the names being given, on the original division of the people (2. 47) τὰ μὲν ἀπ' ἀνδρῶν... ἡγεμόνων τὰ δ' ἀπὸ πάγων. The last word is an emendation, but a pretty certain one, of Kiessling, for πάντων. For the πάγοι, see below, p. 327.

51 Romulus, c. 20. πολλαί γάρ έχουσιν άπὸ χωρίων τὰς προσηγορίας.

⁵² Festus, P. p. 366, Tifata, iliceta. Was this the aesculeium of the lex Hortensia (Pliny, H. N. 16. 10. 37)? See, however, Corssen, Beit. p. 108.

53 Festus, P. p. 366, Titiensis.

⁵⁴ See Livy, 9. 38. ad finem: an interesting passage on the mode of voting in the historical curiae. The alleged omen of the Faucia being east to vote first is clearly an invention due to the Caudine story, The name may have been gentile, but is quite possibly of Roman local origin.

55 Varro, L. L. 6. 23. We have no other notice of this name. See Müller's note.

⁵⁶ See Festus, F. p. 233, *Popillia*. *Pinaria* is reckoned by Mommsen as the name of a *curia*. In Festus it is called one of the "old thirty tribes" (above, n. 48).

⁵⁷ Festus, P. p. 49, Curia: see Gellius, 15. 27.

sacred matters; the *Hostilia*, being primarily devoted to human affairs⁵⁸, is not the religious meeting-house of a particular district, and belongs more to the Senate than to the present subject. It bears however a genuine gentile name, whatever we make of its reputed builder, the legendary Tullus, and his still more legendary ancestor Hostus⁵⁹.

Agnus curio. The bearing of the public festival of the Fornacalia upon the question of plebeian admission into the curiae has been noted above (p. 320). I must at present devote a few words to a more ordinary and domestic application of the curiate connexion as appearing in early Roman literature.

Generally, the whole idea of this connexion, and the quasi-obligations dependent on it, seem to have taken ultimately a somewhat lower place at Rome than did their parallel in Athens. At the beginning of the second century B.C. Plautus gives an indication of this when he speaks of a magister curiae distributing petty doles amongst greedy and low class applicants⁶⁰. But the most remarkable similarity to Athenian usage occurs in the strange passage about the agnus curio in the same scene of the same play, somewhat unaccountably passed over by Costa⁶¹.

The rich old bachelor Megadorus is proposing to marry a daughter of the suspicious miser Euclio, without receiving any dos, and even to furnish, contrary to usage, the expenses of the marriage ceremonial feast. One part of this is the lamb which he takes (with him) for sacrifice, but which Euclio says he may let (go) for burial: so lean it is that you may inspect its intestines (for omen) while it is yet alive. It is

⁵⁸ Varro, L. L. 5. 155.

⁵⁹ See Livy, 1. 12: Dionysius, 3. 1.

⁶⁰ Plautus, Aulularia, 1. 2. 107; 2. 2. 2, 3.

⁶¹ Who gives us, in treating of this and the next scene or two, so much evidence of good sense and philology in elucidating the true meaning of *lex* and *leges* in contract, Dir. priv. nel Plauto, pp. 46, 47

a very agnus curio worn to skin and bone with care⁶². In spite of the silence of Costa, I cannot help recognising here a $\gamma a\mu\eta\lambda ia$ $\theta\nu\sigma ia$, connected with the Roman curia, which had come to be perfunctorily performed, in something like the fashion of the $ai\xi$ $\phi\rho a\tau\rho ia$ of the Athenians, and might accordingly provoke, on a slightly different domestic occasion, the conventional " $\mu\epsilon io\nu$ " of the $\phi\rho a\tau o\rho\epsilon s$, here copied by the snarling Euclio (see App. p. 349).

The Fornacalia. To pass to the national celebration described by Dionysius (see above, pp. 312, 313), no doubt with his Greek traditions and ideas before his eyes—the Fornacalia. The original Feast of Sowing, Harvesting and Oven roasting of the grain for food, which last is indicated in the particular festival instituted by the great religious legislator⁶³, was still kept in Ovid's time by members of the different curiae, properly on different days, of which notice was given by the curio maximus⁶⁴. But, as the uneducated part of the people might not know which was their curia, they were allowed to recover $(a\pi o\lambda a\beta \epsilon i\nu)$ the performance, which they had omitted, retrospectively, on the last day open for the Fornacalia, hence called the Feast of Fools, although it happened to be the day also fixed for the Quirinalia⁶⁵. It may be added that the Fornacalia, by its nature

⁶² Plautus, Aulularia, 3. 6. 25—32. The derivation of curio from cura or its verbal curare (Festus, F. p. 174, Novae) is followed by Festus in a matter-of-fact explanation of Plautus (Festus, P. p. 60, Curionem agnum) and Nonius, p. 86, s.v. curio: what the latter means by curiosus I shall not attempt to explain; any more than Euclio's impossible pun upon conducere and locare.

⁶³ Pliny, H. N. 18. 2. 7, 8. Numa instituit, &c., the passage is too long to quote in extenso. See also Corssen², ii. p. 151.

⁶⁵ This is the explanation given by Plutarch (Quaestt. Rom. 89) to the question διὰ τί τὰ Κυρινάλια μωρῶν ἐορτὴν ὀνομάζουσιν; cf. the passage above cited from Ovid particularly lines 512, 528. Note that, by Plutarch, the curiae (φρατρίαι) are apparently identified with the φυλαί (see above, n. 48). No connexion, that I am aware of, has been attempted of this day with the 1st of April.

evidently a very old rustic festival, comes first among those specially indicated by Labeo as common to the whole people⁶⁶.

Identification of Curiae with Servian tribes. Besides the testimony of Plutarch (note 65) we have passages of Festus in which he distinctly identifies the curiae with the thirty-five later local tribes. To do this he has to bring the thirty of Romulus into line by a clumsy explanation of the centumviri (really 105) being so called quo facilius nominarentur⁶⁷.

This identification is rejected by Mommsen, who remarks that whatever confusion and misapprehension a poor and uneducated man might labour under, as to his gentile connexion with this or that *curia*, he could scarcely go wrong if the *curia* had been definitely and clearly combined with the well-ascertained tribe.

The conclusiveness of this argument may be questioned: nor, in fact, does Mommsen appear to me to account very successfully either for the curiate election of the first tribunes; or for these disorderly *Fornacalia* of the Augustan period⁶⁸. The best solution that I can offer, of these difficulties, has been anticipated above (pp. 319, 320).

Conclusion. The curia, as a political body, was no doubt an association of gentes. These were originally only patrician; but persons not of patrician descent were, we are told, regularly admitted, on some terms and to some extent, to these associations because they were clients of Patricians, or belonged to gentes formally recognised as such, by the original members of the association of curiae,

⁶⁶ Festus, F. p. 253, Popularia sacra.

⁴⁷ id. P. p. 49, Curia; p. 54, Centumviralia. The last passage and others, such as Augustine on Psalm 121, c. 7, and Pseudo Asconius on Var. 2. 1. 5. 14, are rejected by Mommsen as worthy of no reliance, Msr.³ iii. p. 99, n. 3. The subject of plebeian participation in the curiae is treated at great length in Forsch. i. pp. 140—150.

^{*8} Msr. iii. p. 94.

although plebeian. It is in this manner, as I read Mommsen's later explanation, that the entire populus becomes included in the curiae, and the assemblies, whether of the later centuriae or the earlier curiae are equally populi comitia (or populi contiones ⁶⁹). Every plebeian civis as I understand this author, must, as a matter of law, belong to some curia, through some gens, though he may, as a matter of fact, be unable to exercise his rights as such, from inability to prove his particular provenance⁷⁰.

Now there were, as we know, in the early empire, persons of good position but no proveable gentilitas71. Is it not conceivable that there may, even from the earliest times. have been persons, more probably of the lower classes, who were in the same position, and that they may have been loosely ranked as curiales from the secondary meaning of curia to which I have more than once referred? Curia, as the local place of worship for curia the political association. may have come to represent those who were popularly admitted, as neighbours, to take part in the worship, without any recognised right to vote in any political association. This is the sense in which I conceive the inhabitants of the curiae to have voted for the early tribunes, the curia being, as a district, vague and undefined. which, as such, it probably continued to be to the end. The formal notice put up in Ovid's time, the voting for Curial office in the Republic, the carrying of the leges curiatae of which we know extremely little, were no doubt settled by voting ex generibus hominum, the franchise being a proveable connexion with some gens or stirps. The participation in the Fornacalia I take to have been ultimately a mere popular holiday of the "lower orders," in which those who

⁶⁹ See n. 25 to Forsch. i. p. 147.

⁷⁰ See the very unsatisfactory passage in Msr.³ iii. p. 94.

⁷¹ Laudatio Turiae, ll. 21, 22. Bruns, Fontes⁷, i. p. 321.

laid some claim to gentilitas would select the day of their proper gens, but the majority would simply attend the service of the last day, which was also the Feast of the chief national hero. The tie between these last, as curiales, was apparently rather that of neighbourhood and community of conventional festivity than of any idea of relationship, such as is to be clearly recognised in the case of the Athenian $\phi \rho \acute{a} \tau \epsilon \rho \epsilon s$ (see above, p. 313; also § 9, App. pp. 346—350).

The montes, pagi and sacella, which are coupled by Festus⁷² with the *curiae*, as places for public, i.e. national, worship, require but short notice here, as they do not appear, like the *curiae*, to have developed any substantive political function, but to have remained as mere local divisions for minor religious or administrative purposes⁷³.

The two former would seem to have designated respectively the slight eminences on which the original Rome proper stood, and the more level districts surrounding them⁷⁴: they are extended to mean divisions of territory later. Into the doubtful subject of the Septimontium and the much

72 Festus, F. p. 245, Publica sacrà. 73 Msr. 3 iii. pp. 113, 125.

⁷⁴ Pagus, in classical Latin, means a country district or village, whence the rustic inhabitants, who adhered to their old religion were called pagans. It is a word of disputed derivation; connected by Döderlein (Lat. Synon.) with pasco, and so, according to him a (common) pasture land. Mommsen

(Tribus, p. 16) calls it a Flur, i.e. pasture, common.

More modern etymology (Corssen², i. p. 393) refers it to a root signifying fest machen, fügen, binden, and considers the main idea to be enclosure. See Curtius's distinction between pecus and $\pi \hat{\omega} \hat{v}$, the former being das gefangene, the latter das gehitlete, p. 268). This is rather in accordance with Roman tradition. A division of territory into $\pi d \gamma o \hat{v}$ by Numa is alleged in Dionysius, 2. 76 and Plutarch (Numa, 16) no number being mentioned. This may, of course, be only part of the general attribution, to that King, of metes and bounds. Dionysius, 2. 74 and Festus, P. p. 6, Aliuta. The idea of enclosure is, however, supported by Festus's comparison with the Attic Demes (see App. p. 352, and Festus, P. p. 72, $\Delta \hat{\eta} \mu o \hat{v}$, criticised by Mommsen, Msr. iii. p. 116, n. 2). Further on the pagi, see § 16, pp. 513 sqq. The word must be distinguished from the Homeric $\pi d \gamma o \hat{v}$, with which it is probably confused by Dionysius and Plutarch, l.c. For a different confusion see Festus, P. p. 221, Pagani.

disputed topography of Rome, particularly after the later date given to the above *enceinte*, and its encircling walls, by Pais and his adherents⁷⁵, I cannot enter, having had no opportunity for the personal inspection which is more than ever required by the recent excavations of Boni and others.

In the comparatively recent period of the end of the Republic or the beginning of the Empire, we find the *montani* and *pagani* as persons of different districts between whom the Roman water supply is to be distributed by lead pipes⁷⁶.

Among the literary records of antiquity, the following passages are perhaps also worthy of consideration as throwing some little light upon what has been here regarded as the unifying principle of curia and gens. Varro, after describing the Septimontium, proceeds to give an account of remaining portions of the City, which were anciently defined according to the chapels of the Argei situate in them; an account evidently drawn in the main from an ancient Priests' book of these chapels, shewing their local position and that of other shrines in each particular locality⁷⁷. The legends interspersed in this list come from various sources but the account itself generally bears out the idea⁷⁸ of the pagi as flats connected with the montes or colles, and possibly once outside an old town wall, but at some very early period included within it⁷⁹.

Argei. Of the Argei, whose chapels (Argea) serve as the basis of division, we have the most strangely contradictory stories. These chapels are the tombs of Argive

⁷⁵ See, e.g., Pais, Anc. Leg. pp. 234 sqq.

⁷⁶ Festus, P. p. 340, Sifus. No exact date can be given to the lex Rivalicia referred to, from its proposer Ser. Sulpicius, no coin of the gens indicating any connexion with the subject. The leges Sulpiciae of Epit. Liv. lxxvii. and App. Bell. Civ. 1. 55—57 are purely political.

⁷⁷ Varro, L. L. 5. 45-54.

⁷⁸ See Msr.³ iii. pp. 114, 115. Mommsen apparently, ib. p. 124, n. 2, wishes to cancel his former hypotheses in Tribus, pp. 211—215.

⁷⁰ As the Louvre, originally outside the walls of Paris.

heroes⁸⁰: but these very heroes are otherwise represented in the rushen figures (scirpea simulacra), which were cast yearly into the Tiber, from the pons sublicius by the Vestals⁸¹. Dionysius has a wild story of Hercules inducing the original inhabitants to substitute this rite for their former practice of human sacrifice to Saturn⁸²: to which Ovid adds another tradition of the ancient Romans' systematic despatch of all their old men, over sixty, by drowning. This he rejects; coupling it, however, with one of the old fashioned realistic explanations, from the alleged limit of the franchise to those beneath that age⁸³: and winding up with a poetical fancy of his own, about the symbolical return of Hercules' homesick comrades, or rather descendants, to their beloved Argos.

Of this galimatias, a part has been adopted in Jhering's delightful but very fanciful posthumous work "The Evolution of the Aryan," as a feature of the Wandering⁸⁴. The strange style of Argei, which Jhering leaves as hitherto inexplicable, has been referred, by an ingenious suggestion of Mommsen, together with the possibility of an original drowning of strangers, to a not unintelligible Etruscan detestation of the Argei, as Greek pirates (Seerāuber)⁸⁵. The names of these

⁸⁰ Festus, P. p. 19, Argea.

⁸¹ ib. p. 15, Argeos: Varro, L. L. 7. 44.

⁸² Dionysius, 1. 38: Ovid, Fasti, 5. 621-660.

⁸³ Which does not appear to be the case, see Mommsen's very able note Msr. ⁸ii. 408. 2. Hence in Paley's note on Fasti, 5. 634 "no votes" is a mistake. In the passage of Varro quoted by Nonius, p. 523 (Sexagenarios), Mommsen's emendation of quo for quod is both grammatically and logically required. The literal rendering of depontani, Festus, P. p. 75, apparently accepted by Paulus (Diaconus), and the legend connected with it, runs distinctly counter to the fundamental Roman ideas of respect for age (see § 8, p. 280), the duration of patria potestas, and the horror of outrage on a parent.

⁸⁴ tr. Drucker. Book IV. pp. 355, 356. See below, § 13, p. 416.

⁸⁵ Msr. iii. pp. 123, 124, n. 6. This may seem a wild suggestion, but I may be permitted to refer, in support of it, to the old "grammarians" explanation of Κρησφύγετον—a refuge from the Cretan—not necessarily Minos individually, but any of his "rovers." The riches and splendour of the Minoia regna, which Messrs Evans and Hogarth are now revealing to us,

chapels are bound up, as we see from Varro, with some of the oldest Roman legends, and with a record of extremely barbarous rites, sometimes with a practice, or tradition, of extremely disgusting ones⁸⁶. There is, in all this, nothing inconsistent with the idea that we may here trace remnants of a rude and diversified primeval worship, by a race probably even nearer to the primitive savage than were the Attic $a\dot{v}\dot{\tau}\dot{\alpha}\chi\theta\sigma\nu\epsilon$ but, passing through various stages of improvement and social intercourse, mainly under the influence of a unifying and exalting religious sentiment.

Some of these stages I take to have been reached on the joining themselves into such associations as *gentes* and *curiae*, although the reduction of these into a regular system is due, later, to the general union of tribes suggested above (§ 6, p. 235) and the development of one supreme power which form the subject of the succeeding sections 11—15.

No internal government in the elements hitherto considered. Neither in the pagi nor in the curiae, at Rome, any more than in the gens^{86a} do we find any clear trace remaining of particular self-government or of definite corporate action. If such ever existed it would seem to have been entirely merged in the constitution of the populus as a whole. In later times, indeed, the pagi appear to have been utilised, to a certain extent, but only for minor departmental purposes. They do not become political districts,

were certainly not all due to the natural produce of the isles or the sea-coast of Peloponnesus over which that King ruled. Whether his rovers were recruited from Crete or Argos they were probably equally feared and hated by the inland Greek, or the peaceable Italian settler, lumbering about, to quote Carlyle, in pot-bellied equanimity, and would get short shrift, if caught.

⁸⁶ On Festus, F. p. 154, Mutini Titini sacellum, see Müller's note and Pais, Anc. Leg. p. 294, n. 60.

^{86a} See above, § 5, pp. 154—157, also Mommsen, Msr.³ iii. p. 100. He proceeds throughout on the assumption of all being divisions of a pre-historically united *populus*.

like the Demes of Attica, but were kept up, most probably until the rearrangement of the regiones urbis by Augustus 87, under a yearly lustration by their magistri 88. We know so extremely little of the minor secular functions which came to be entrusted to these officers that it would be waste of time to enquire into the details of them. It would certainly seem, from the mere terms magister and lustratio, that the original character, if not the object, of this mode of territorial division was connected with religion89, as might be inferred from its reputed author Numa⁹⁰; though the grandmotherly surveillance attributed to the officers of the pagi, by Dionysius, is an evident anticipation of the actual interference with private affairs which was really exercised, on occasion, by the later Censor. Possibly the magister curiae may have come to associate, with his religious presidency, the opportunity of acquiring political popularity, by some small largesse on festal occasions⁹¹; but all this is a mere conjecture of possibilities; the post must have ceased, in Plautus' time, to be one of any serious importance, like that of the τριττύαργος in the time of Plato and Demosthenes92.

The Argean Chapels appear, according to Dionysius, to have been also thirty, from the number of Victims sacrificed in effigy connected with them⁹³. They were distributed, and possibly their number fixed, at some such time as that of the settlement of the curiae and gentes suggested above, over the twenty-seven parts of the city

⁸⁷ Suetonius, Augustus, c. 30: cf. Dio, 55. 8. This was about 747 B.C.

⁸⁸ See Siculus Flaccus quoted in Msr. 3 iii. p. 116, n. 6, and the inscriptions there referred to.

⁸⁹ Msr. iii. p. 117.

⁹⁰ Dionysius, 2. 76.

⁹¹ See Plautus' Aulularia, 1. 2. 107, 108 and App. p. 350.

⁹² As to Plato see Rep. 475 A. As to Demosthenes, I am distinctly under the impression that the office is somewhere represented as having been held by one of the very questionable clients for whom he wrote some of his private speeches: but I cannot lay my hand on the passage.

⁹⁸ Dionysius, 1. 38.

mentioned by Varro⁹⁴ in the well-known passage in which he quotes an account of the different consecrated spots "from the rite-book of the *Argei*⁹⁵." This does not preclude their having been an earlier and probably prehistoric institution.

Mommsen⁹⁶ regards the distribution of these chapels as independent of, and prior to, the Servian quadripartite division of the city (see § 16, p. 514).

The question of possible election to membership of the Senate by a *curia*, has been already discussed, § 8, p. 290.

⁹⁴ Varro, L. L. 5. 45. Müller holds that this is not, according to Varro, a division of the city into partes but merely a distribution of sacraria. However that may be, the xxiv of Varro in L. L. 7. 44 must certainly be corrected to xxvii, from 5. 45: but I cannot explain this number, nor Ovid's duo in Fasti, 5. 627, see Mommsen's note cited in my n. 96.

⁹⁵ In sacris Argeorum scriptum, L. L. 5. 50, 51.

⁹⁶ Msr.3 ii . p. 125, n. 1.

APPENDIX TO § 9

COMPARISON of Greek legend, mainly Attic, p. 332. Curia and φρατρία, φυλή, 333. Greek triads, Dorian, 335. Attic four tribes. 336. Ζεύς Τελέων, 337. 'Αργαδείς, Αλγικορείς, ib. Pollux' three Attic tribes; his previous quaternions, 338. Parallel to Roman tribes in heroic legend, 339. Cleisthenes of Sicyon; the Attic tribes of Cleisthenes, 340. Aristotle on the Attic reform, 341. τριττύες, ναυκραρίαι and συμμορίαι, 342. Tens and thirties of lexicographers and grammarians, ib. Meier on γένη and φρατρίαι as subdivisions of φυλή, 344. Final rejection of numerical parallel, 345. Fundamental character of γένος and φρατρία, 346. ἀφρήτωρ, 347. φρατρία and blood-feud, ib. A family register, γαμηλία and agnus curio, 348. Rearrangement by Cleisthenes, 349. Differences from Roman case, λέσχαι, 350. Origin and names of γένη. Of demes, Differences in sequel between Rome and Attica, 353. Conclusion as to curia, φρατρία and tun, ib. Difference from Mommsen, 355,

Comparison of Greek legend, mainly Attic. The union of three so-called Romulian tribes into one populus, which has been accepted as probably more in accordance with fact than the subdivision of a populus into tribes by a fabulous founder, has been hypothetically attributed, in § 6, to the first of the Tarquinian dynasty. The suggested gradual approximation to a true Sovereignty at Rome will be treated in subsequent sections, under the heads of tribunus, pontifex and rex, the positions successively maintained being supported, as far as possible, by surviving practice. Before dealing with these matters, however, I wish to add a few of the parallels which have been drawn to the three old Roman tribes, and their alleged subdivisions, with the view of

investigating what may possibly be inferred, from nomenclature or otherwise, as to the composition of the latter, and that of the populus into which they coalesce. I must give. as elsewhere in considering the elements of national association among the Aryan peoples, a prominent place to Greece, mainly because Greece is coming to be more generally recognised as the mother of much that is Roman, but partly also because it was by the great critical historian of Greece that note was first taken of that process of coalition, which is held to be a law of national formation, at least in the West, by most modern research and theory 97. Thus Leist, who expatiates upon the fundamental organisation according to the "trinity of γένος, φρατρία and φυλή" as the peculiar stamp of the Aryan race, in distinction from the Hamitic in Egypt and the Semitic in Mesopotamia 98, proceeds to examine specially the earlier elements of the Dorian and Attic constitutions. The particular and extraordinary coincidence of the latter, in point of numbers, with Roman legend, is well known.

Curia and $\phi_{\rho\alpha\tau\rho'\alpha}$. $\phi\nu\lambda\dot{\eta}$. As this is more prominently the case with regard to the Curia, I have put together the whole of my remarks on this coincidence under that head, though the first part of them belongs rather to the third member of Leist's Trinity, the $\phi\nu\lambda\dot{\eta}$. For these remarks, and the data, on which they are founded, I must own my obligations largely inter alia to Meier's essay de gentilitate

⁹⁷ See § 1, p. 16. I refer of course to Thucydides, e.g. 1.6—14 and particularly as to the $\sigma vrolki\sigma is$ of Theseus, 2. 15. Whatever may have been the real belief of the historian, in the heroes cited, their individual existence could not have been disclaimed by him, without incurring the loss of any possible audience, perhaps even a prosecution for $d\sigma \ell \beta e ia$. Polybius himself, who takes Rome as he finds her, and gives little quarter to his own historical and geographical predecessors, takes Homer much au pied de la lettre, endorses most of the reputed acts of Lycurgus, and apparently accepts a good many of the stories about Hercules.

⁹⁶ Leist, Gr.-Ital. Rg. §§ 18-26.

Attica. This treatise, though published in 1835, and therefore full of the old-fashioned implicit belief in the characters of early "history," is not, that I can see, superseded, as a storehouse of tradition and quotation from original authorities: of course it requires to be supplemented from later discovered sources, like Aristotle's work on the Constitution of Athens, and more modern speculations such as those of Maine and M'Lennan, Grote and Busolt. I have endeavoured, as elsewhere, to make what I can out of early tradition or literature, helped out by the original meanings of words as disclosed with more or less certainty by modern philology: but on the whole I rely more upon survivals of practice in a historical period, as confirming what we are told of such matters as the actual reforms of Cleisthenes, and the more doubtful memories of Solon.

The generic title $\phi\nu\lambda\acute{\eta}$, is no doubt, as derived by Curtius ⁹⁹, merely significant directly of race or breed, implying probably a notion of common descent; but cannot be said definitely to connote any specific idea of political or military organisation ¹⁰⁰. The particular names, on the other hand, of individual $\phi\nu\lambda a\acute{\iota}$, are like many national names interesting and suggestive (below, p. 340). It must, of course, be remembered that the term $\phi\nu\lambda\acute{\eta}$ is often applied, by our historiographers and antiquarians, in a very vague manner and evidently as

⁹⁹ Curtius⁵, p. 304.

indicating very different associations or assortments of men 101.

Greek triads. Dorian. The principal object of this Appendix is to shew that a most remarkable parallel to the Curiate system at Rome may be reasonably accounted for by considerations based on admitted fact without having recourse to the automatic or trichotomous theory above referred to (§ 9, p. 314). To begin with what appears, on many grounds, to be among the oldest of Grecian stocks, the Dorians do certainly seem to have had a favourite number three, dating from very early times. It appears in the Homeric and Hesiodic poems 102: it accounts for a good deal of the system represented to us as introduced or confirmed by Lycurgus 103: perhaps even for some part of what is alleged of the Athenian Constitution as possibly preceding the time of Solon (below, pp. 341 sqq.): it is the part which comes after him that so closely corresponds to the threes and thirties of Rome (see below, pp. 341, 342). It is possible that even the three Dorian tribes may have replaced an original duality 104, though the triple arrangement was, as we

101 See below, p. 341, and the cases considered in § 5, p. 160. Also Grote (1888), ii. p. 435, n. 1. In the Scholium to Pindar, which he there quotes, the Aegidae are called both a $\phi\nu\lambda\dot{\eta}$ and a $\phi\rho\alpha\tau\rho\ell a$ of Thebes: their description by Herodotus (4. 149) who also calls them a $\phi\nu\lambda\dot{\eta}$, is more suitable, according to my idea of the words, for a $\gamma\epsilon\nu\sigma$ than either for a $\phi\nu\lambda\dot{\eta}$ or $\phi\rho\alpha\tau\rho\ell a$. For a confusion (probably late) of $\phi\nu\lambda\dot{\eta}$ with $\delta\eta\mu\sigma$ see the Etymologicum Magnum, p. 760, s.v. Titakíða.

103 Hom. Il. 2. 665, 668: Hesiod, Fr. 191 (Rzach). For the true derivation of τριχάϊκες see Curtius⁵, pp. 163, 738.

103 e.g. the thirty elders, Plutarch, Lycurgus, 5, 6; the thirty $\dot{\omega}\beta ai$ (see however Grote, ii. p. 281): the $T\rho\iota\eta\kappa\dot{a}s$ or company of thirty men, Herodotus, 1.65. As to the personality of Lycurgus, Grote, ib. pp. 262 sqq.

104 I must not attempt any explanation of the Τλλεῖs and Δυμῶνες: they are possibly local words, like Αἰγιαλέες (see Rawlinson, iii. p. 225 on Herodotus, 5. 68, and generally Grote, ii. pp. 280, 281). But the Πάμφυλοι must surely be a later, and inferior, addition. The two kings of Sparta may also be cited as some testimony to an original Dorian duality. See however the arguments of Grote (ii. p. 262) against Sparta being taken as a type of

have seen, arrived at in the early times of the older poets, and it was generally preserved through the Dorian settlements. The further extension of the triple arrangement to thirty & βaí 105, suggested by Müller, is rejected by Grote as having no authority. It seems almost certain to have been laid down in some passage of a "grammarian," but I cannot find any such.

Attic four tribes. The people of Attica, on the other hand, and the colonies of Ionian character generally, were, according to the prevalent belief, divided, in early times, into four so-called tribes: the names of which, however, unlike the suggested local originals of the Dorian stock, do obviously designate, in the majority of cases, differences of birth or occupation and manner of life, which last tend to become hereditary, even if descent is not so carefully observed as to amount to caste 106. I refer, of course, to the Γελέοντες, "Οπλητες, 'Αργαδείς and Αίγικορείς of Herodotus, 5. 66, of which I am inclined on the whole to accept Rawlinson's explanation 107, although I think a little further comparison is desirable both with the divisions suggested in earlier times, and with those which undoubtedly subsist in later 108. Dorian principles generally. There is possibly a third tribe of inferiors indicated in the stories about the colonisation of Samos. See Etym. Mag. s. v. 'Αστυπάλαια.

106 The &βai (= κῶμαι) are undoubtedly a very old kind of local district. being named in the famous Lycurgean ρήτρα. On what ground Grote calls this a compact I cannot see. It is stated in Plutarch to be a marrela brought from Delphi (Lycurgus, 6): both in derivation and tradition it corresponds to the Latin lex as an utterance read to an assembly. See, however, Curtius, p. 343, for βήτρα = spruch: for the original meaning of lex, Jurisprudence, i. pp. 303, 304. The Eleian Γράτρα expresses no more than proclamation.

106 See the sensible remarks (p. 5) of Meier, de gent. Att., on this point. 107 iii. p. 222 on Herodotus l.c. "Priests, warriors, artisans, goatherds." I question their derivation from the castes of Egypt, to which Rawlinson inclines, but agree with him in demurring to Grote and Clinton's peremptory negation of any idea of caste in ancient Greece (ib. and p. 223).

108 Plutarch (c. 25) makes Theseus divide his populace into Εὐπατρίδαι και Γεωμόροι και Δημιουργοί: for the later divisions see n. 112.

Γελέοντες have always been a difficulty; and there is some authority for two variae lectiones, Γελέοντες and Γεδέοντες, either of which might easily arise from an incorrect representation of one letter, the Γ or Λ . For the latter, however, there is little authority and less explanation. The ordinary form is supported by the $Ze\acute{\nu}\varsigma$ Γελέων of an inscription, dating from about the beginning of the Roman Empire, which is considered conclusive by Ross, Demen von Attica(pp. vii, ix) and Meier. Abicht accordingly (iii. p. 61) retains Γελέοντες, translating it die Glänzende, a natural epithet of Zeus, but here understood by Abicht as referring to the head family of the town of Cecrops (cf. Luceres at Rome, § 6, p. 232).

In spite of this amount of authority and analogy, I am inclined to believe that the God of the inscription may have been really $Z\epsilon\dot{\nu}_S$ $T\epsilon\lambda\dot{\epsilon}\omega\nu$ the accomplisher of prayer (or curse, as in Aeschylus, Agam. 973), and to consider the $T\epsilon\lambda\dot{\epsilon}o\nu\tau\epsilon_S$ (for whom Euripides, Ion, 1579 is no bad voucher) as Priests, corresponding at the same time pretty well to Theseus' $E\dot{\nu}\pi\alpha\tau\rho\dot{\iota}\delta\alpha\iota$, who are pointedly set apart by him, in Plutarch¹⁰⁸.

'Αργαδας, Αιγικορας. The "Οπλητες, who possibly owe their specific recognition to the legislation of Solon, speak for themselves. Of the two last tribes, the 'Αργαδεῖς are generally identified with the $\Delta \eta \mu \iota \sigma \nu \rho \gamma \iota \delta$ attributed to Theseus, and the $A i \gamma \iota \kappa \sigma \rho \epsilon \hat{\imath}_{\varsigma}$ with his $\Gamma \epsilon \omega \mu \delta \rho \sigma \iota^{110}$. The last identification is not, at first sight, very satisfactory, particularly if we consider the $\Gamma \epsilon \omega \mu \delta \rho \sigma \iota$ to represent the later landed aristocracy. But we may fairly arrive at it by a process of exclusion, if we accept the testimony of Strabo, who goes back to two earlier fourfold divisions of Attica, one (that of

¹⁰⁰ Plutarch, Theseus, c. 25. ἀποκρίνας χωρίς. The same author, however, in Solon, c. 23, while he identifies the Έργαδεις with τὸ ἐργατικόν, makes the Γελέοντες to be οἱ γεωργοί.

¹¹⁰ Abicht², however, in a somewhat unintelligible part of his note (iii. 62, n. 1) calls the 'Αργαδεϊ (as does also Curtius⁵, p. 647) Feldarbeiter, which appears to indicate some confusion with the Γεωμόροι.

Xuthus) local, which does not at present concern us, another into tribes and modes of life (βίοι)—γεωργοί, δημιουργοί, $i\epsilon\rho\sigma\pi$ οιοί and $\phi\'
u\lambda\alpha\kappa\epsilon\varsigma^{111}$.

Pollux' three Attic tribes: his previous quaternions. Curiously enough, in old editions of Pollux, the $\Gamma \epsilon \lambda \epsilon \epsilon \nu \tau \epsilon s$ are omitted altogether from the latest list of the old tribes (before Alcmaeon) given by him, the 'Aryadeîs being at the same time replaced by Kadeîs, which does undoubtedly mean artificers¹¹². It is to this author Pollux, in the same article, headed $\pi \epsilon \rho l$ $\tau \rho \iota \tau \tau \nu \dot{\alpha} \rho \chi \omega \nu^{112a}$ that the elaborate system is mainly due, which we are obliged to compare with that of the Roman curiae and gentes.

The strange omission by Pollux above-mentioned is inconsistent with other passages of the same author, and has therefore been regarded as corrupt, and emended in accordance with the usually reputed four tribes (see note 112 and Pollux, ed. Bekker, § 109): but it appears to me just possible that Pollux may have intended, for the nonce, to begin, just before the reform of Cleisthenes, with one of his favourite triads: the $\Omega \pi \lambda \hat{\tau} \alpha \iota$, $\lambda i \gamma \iota \kappa o \rho \epsilon \hat{\iota}_s$ and $\lambda \rho \gamma \alpha \delta \epsilon \hat{\iota}_s$ (or $\Delta \delta \epsilon \hat{\iota}_s$) being divisions of the $\Delta \lambda \hat{\tau} \theta \sigma s$, exclusive of the priestly caste (see above, p. 337); corresponding very closely with the $\Delta \epsilon \delta \epsilon \delta s$. Hedurous and $\Delta \epsilon \delta s$ of the time of Pisistratus, which apparently reappear in the accounts of Cleisthenes' reform, and account, as we shall see, for his $\Delta \epsilon s$ recognised

111 This last division is attributed, as by Herodotus, to Ion. The passage in Strabo, which, from Rawlinson's manner of reference (8. 556), I had some difficulty in finding, is Strabo, 8. 7 (Meineke, p. 383 of Casaubon, 1620). The identification of Goatherds and Landowners is, after all, not impossible in the homely conditions of life, in which these old terms originated. Compare our Gaekwar of Baroda.

112 See Curtius, § 25, p. 138. These last tribes are έπὶ Ἐριχθονέως τε καὶ Λέοντος 'Οπλίται, Αίγικόρεις, Καδεῖς, which has been "corrected" to έπὶ Ἐριχθονέως Γελέοντες κ.τ.λ. At the end of the same chapter, the three "divisions" of Theseus Εὐπατρίδαι, Γεωμόροι, Δημιουργοί are repeated under the style of τρία εθνη.

112 Pollux, 8, 9. 31.

local party divisions¹¹³. Of the previous quaternions in Pollux' article¹¹⁴ Meier takes no account, though, in my judgement, the transition from purely topographical styles (like 'Arraía, Koavais, &c.) to others connected with the great Athenian Deities, might perhaps deserve a little more consideration, as a matter of political evolution 114a. The later ten tribes of Cleisthenes (Herodotus, l.c.) are given in full by Rawlinson¹¹⁵. They are all formed from names of legendary heroes or Kings-possibly objects of local worship. For these historical Attic tribes are universally recognised as local (τοπικαί), whether we accept the traditional explanation of the old ones as yevikai or not. To me, the latter indicate mere divisions of politics in the modern sense: they are not constitutional divisions of a polity at all, and can only be compared, in a very loose and inexact way, with the distinction of patricians (or optimates) and plebeians.

Parallel to Roman tribes in heroic legend: $\phi \nu \lambda o \beta \alpha \sigma \iota \lambda \epsilon \psi s$. If a Greek parallel to the Roman warlike tribe is to be found at all, it is rather in the old heroic stories of migration or joint expedition, where the relation of the $\phi \hat{\nu} \lambda o \nu$ and the $\phi \rho \dot{\eta} \tau \rho \eta$ apparently exists (above, p. 334, n. 100), but in a much looser state of organisation than that of the Romulian or Ramnian host. It is from a slightly earlier stage of development that the $\phi \nu \lambda o \beta \alpha \sigma \iota \lambda \epsilon \dot{\psi} s$ probably

113 Compare Herodotus, 1. 59 with 5. 66 and see Rawlinson as referred to in n. 107: also Abicht's Herodotus, i. p. 89, n. 13 and Grote (1888), ii. p. 464 all of whom substantially agree that the Πάραλοι represent the wealthy scafaring middle-class, the Πεδιαΐοι the landed interest, and the Τπεράκριοι the poor.

114 Under Cecrops, they are Κεκροπίς, Αυτόχθων, 'Ακταία, Παραλία: under Cranaus, Κραναίς, 'Ατθίς, Μεσόγαια, Διακρίς: under Erichthonius, Διάς, 'Αθηναίς, Ποσειδωνιάς, 'Ηφαιστιάς: lastly the three (or four) named from sons of Ion (above, n. 111). On all this Meier (§ ii. p. 3) holds that Pollux non est audiendus.

114s Compare the general view of the Roman curic in § 9, and the suggestion of Miss Phillpotts in § 4, p. 134.

115 Rawlinson, iii. p. 223, n. 7.

descends. This officer we find during historical times in the exercise of the narrower function only of a Roman rex sacrificulus 1158. But the office of Basileus in the Homeric and Hesiodic poems is distinctly judicial 116. This in fact I take to be an important step in the gradual development of true sovereignty; in one of the sections on which subject the remarkable word βασιλεύς and its original conditions, in point of court and character, so far as can be made out from ancient authority and analogy, will be more fully dis-At present I pass on to the Cleisthenian tribes and their divisions, which have been much confused with the older φρατρίαι by lexicographers117. It is an interesting enquiry what can be made out of specific tribal, or national, names, but, as too much in the nature of a digression from my main subject, this has been placed in the Appendix to § 6.

Cleisthenes of Sicyon. The Attic tribes of Cleisthenes are a subject the treatment of which can scarcely be understood without reference to a Dorian precedent. The three original Dorian tribes (above, p. 335) at Sicyon, were ridiculed and disparaged by an elder Cleisthenes who had established himself as $\tau \dot{\nu} \rho a \nu \nu o_s$ of that town, the sacred number being at the same time changed to four, by the addition of a tribe of Cleisthenes' own devising, called ' $A\rho \chi \dot{\epsilon} \lambda a o \iota$, but afterwards changed by the people to $Ai\gamma\iota a\lambda \dot{\epsilon} \epsilon s$, nominally after a son of their favourite hero Adrastus—in reality apparently a local addition. It was in imitation, says Herodotus, of this conduct of his maternal grandfather that the Athenian Cleisthenes changed the names and number of

^{115a} See Ridgeway quoted in Sandys' Aristotle's Constitution of Athens, p. 32 n.

 ¹¹⁶ Cf. Pollux, 8. 9. 31 with Homer, II. 18. 556: Hesiod, Op. et D. 202, &c.
 117 With regard to their usual treatment as subdivisions of Cleisthenes' tribes I prefer to agree with Meier, see below, p. 344.

the old Ionian tribes at Athens, making the four into ten, and assigning the land divisions ($\delta \hat{\eta} \mu o \iota$) ten to each tribe ¹¹⁸.

Aristotle in treating of this reform of Cleisthenes, says he purposely avoided an arrangement into twelve tribes, in order that he might not have to divide the people according to the previously existing τριττύες—for there were already, out of the four tribes, twelve τριττύες 119 in which case he would not have attained the desired result of blending (or mixing up, ἀναμίσγεσθαι) his populace. So he also divided the country, by demes, into thirty parts, ten urban (the poor, anciently the Υπεράκριοι, see Herodotus, 1, 59), ten on the coast (Πάραλοι, the wealthy mercantile class), ten in the interior (Πεδιαΐοι, the landed aristocracy), and, calling these τριττύες, assigned them by lot three to each tribe, so that each tribe might have its share in all the (three political) districts120. Moreover he created the deme-membership and connexion of those who lived in the same deme, so that they should not go into questions of ancestry, but simply describe one another as of such a deme 121. But the vern and the

118 Herodotus, 5. 66—69: Rawlinson, iii. pp. 222, 223. For this explanation of δέκα...τοὺν δήμουν κατένεμε ἐν τὰν φυλάν see Abicht², iii. p. 66. I take the article to mean Cleisthenes' distribution or assortment of a kind of district division already known in Attica (see Plato, Hipparchus, 228 p). On the interpretation of the passage in Herodotus generally see Sandys l.c. in note 120.

119 See Aristotle, Const. of Athens, 8. 3. το ἀρχαῖον i.e. in the old times before Solon, there had already been assigned three τριττύες and twelve νανκραρίαι to each tribe. These original thirds are the real difficulty: for those of Cleisthenes can be explained. Is it possible that the idea of triple division originally came from a Dorian source, i.e. the primeval overrunning of Attica attributed by Herodotus (5. 76) to the time of Codrus? The νανκραρίαι must surely date from a time after the inhabitants had begun to be a seafaring nation. But see Grote (1888), ii. p. 427, n. 1. Curtius p. 155 marks ναύκραροι = Schiffsmacher with a?

120 Aristotle, Const. Ath. 21. See generally the notes on pp. 80-83 of Sir John Sandys' edition.

 181 This last sentence is rather a paraphrase, giving what I consider to be the sense, than a literal translation.

φρατρίαι and the priesthoods he allowed every one to retain according to his hereditary practice 122.

τριττύες, ναυκραρίαι and συμμορίαι. In these difficult passages, I cannot pretend to state, much less to answer all the questions which arise: but I think this much is clear. The object of Cleisthenes 123 was inter alia to prevent local faction and, so far, to democratise the constitution, (1) by grouping together for political action, in larger masses, portions, not contiguous in locality, of those districts which had definitely different political tendencies; (2) by substituting in these new constituencies, as we may call them, a new system of nomenclature, amounting to a voting qualification, instead of the former one, which still retained. after the reforms of Solon, a considerable element of family or aristocratic exclusiveness. The fact of these new constituent bodies being called τριττύες may be partially accounted for by the combined portions of the three districts above described, but is rather due to old Dorian tradition. Anyhow these new τριττύες are no doubt those of which we read in Plato, the government in which is an object of the humbler ambition of a second-rate man 124.

Tens and thirties of lexicographers and grammarians. The introduction of the multiple ten is here no survival of a military order, as it is suggested to have been at Rome, but part of the general plan of extension, an arbitrary and deliberate selection of number, with the intention of parting from the old tribal quaternion and all

¹²⁸ Aristotle, Const. Ath. 21. 6. See Sandys' note, p. 83: Demosthenes, c. Eubul. 1318 &c. and generally Bossler, de gentibus et familiis Atticae sacerdotalibus.

¹²⁸ See Grote (1888), ii. pp. 435 sqq.

¹³⁴ Plato, de Rep. 5. 475: in Demosthenes, de Symmoriis, p. 184, the τριττύει appear to be divisions, ad hoc, of arsenal-ground and ships ordered: the whole speech is in favour of the predecessors of the συμμορίαι being naval.

its associations 125. On the possible addition of fresh φρατρίαι, the question what became of the vaukpapias and the ultimate substitution of συμμορίαι those who wish may consult the article of Photius on ναυκραρία (Porson, i. p. 288) and Sandvs' notes on §§ 4-6 of Aristotle's Const. c. 21. It is enough for my present purpose to account for the τριττύες and the thirties; on which we may compare the simple and intelligible statement of the philosopher with the confident and loose or questionable details of the later lexicographers and "grammarians." The Scholiast, for instance, on the passage of Plato 126, tells us that at Athens the ten tribes were divided into threes, τριττύες, έθνη and φρατρίαι. Timaeus in an obviously corrupt passage s.v. Γεννηταί 127 says that a φατρία (sic) is a third part of a tribe, which is also called τριτύς. Finally, the Scholiast on Plato's Axiochus (p. 371) gives us, as on Aristotle's direct authority, a full Romulian system, each φρατρία having thirty γένη, each γένος thirty men 128. The latter part of Pollux' article (8. 9) is to the same effect. the only new point being an identification of the thirty men with the Lycurgean τριακάς 129.

A passage, printed in full by Sandys¹³⁰, from the Lexicon Demosthenis Patmiacum, begins by following Timaeus (whose mis-spelling, $\phi a \tau \rho i a$, it copies), but goes on to a fanciful explanation of the Athenian system, again, as above, pur-

¹²⁵ It is scarcely worth while to quote vague uses of $\delta \epsilon \kappa a$, such as II. 2. 372, 489, 4. 347, &c.

¹³⁶ Bekker's Plato, x. Schol. p. 406.
127 Ruhnken³, p. 42.

¹²⁶ Bekker's Plato, ib. p. 465. See also Etym. Magn. and Harpocration, s.v. φράτορες and the interesting Schol. on Aristoph. Aves, 766.

¹²⁸ Above, n. 103. Hesychius' ἀτριάκαστος (ξεω τριακάδος) and τριακάς = σύστημά τι τῶν πολιτῶν are consequences of this occasional identification rather than independent evidence. So too with various confused interpolations of Spartan institutions "παρὰ τοῖς 'Αττικοῖς" by the unknown author of the Glossae Herodoteae.

¹³⁰ p. 267, s.v. γεννήται. The Ms. of this Lexicon is attributed to the tenth century A.D.

porting to be a quotation of Aristotle's own words. According to this, the four tribes copy the seasons of the year, the number three is introduced for the express purpose of making the total match the twelve months, while the thirty $\gamma \dot{\epsilon} \nu \eta$, and the thirty men in a $\gamma \dot{\epsilon} \nu o s$, represent the days of a month.

Meier on γίνη and φρατρίαι as subdivisions of φυλαί. Meier, who is apparently willing, as Niebuhr with the Roman gentes, to accept the γένη as civil (i.e. artificial) associations, connected by bonds of common worship, but not of blood ¹³¹, nevertheless objects to the treatment of the φρατρίαι as subdivisions of the tribes: his view being that the phratric system is coordinate with, but not subordinate to the pre-Cleisthenic tribal arrangement. The original twelve phratries were, he considers, a probable survival from an original local subdivision, or rather co-existence, of twelve smaller states, the association of which into one, tradition represents as the συνούκεισε of Theseus ¹³².

In most respects I entirely agree with him: there is no inherent improbability in the tradition accepted by Strabo that there were in very remote antiquity twelve districts of Attica ¹³³. This is in no wise disproved by the fabulous alleged Settlor (Theseus) or his equally fabulous predecessors. Indeed, it is to this presumed original local character of the $\tau \rho \iota \tau \tau \dot{\nu} s$, that we may possibly refer, as in the case of the Roman curiae (above, § 9, pp. 325, 326), the presence, at

¹³¹ Meier, pp. 10 and 23. ¹³² ib.

¹³ ib. p. 0. See Plutarch, Theseus, 24; Thucydides, 2. 15; and Strabo, 9. 20 (c. 397) who makes these twelve πολεΐς previous συσοκίσει of Cecrops. Indeed the whole of the circumstances of the Apaturia, with its primitive references to the Vintage God and the Gift of Fire, point to an antiquity for the phratric association anterior to any historic or quasi-historic person, even to the mythical Theseus, who is accepted by Meier (pp. 10, 12), as its founder. Returning to what is said above, may I be allowed a comparison of the οΙνόπται (Photius, ἐπιμεληταὶ τοῦ φράτορας ἡδὺν οἶνον ἔχειν) with the Aletasters of the Anglo-Saxon bythfilling?

the historic phratric festival, of many persons, who may have been admitted into the tribal system of Cleisthenes¹³⁴, but would have had small chance of this under a φυλοκρίνησις ("ferreting into genealogies") according to the old tribal and phratric system¹³⁵.

Final rejection of numerical parallel. The elaborate system, therefore, of Attic subdivisions, which, in the hands of later reporters, presents so close a parallel to the alleged Romulian system, cannot be considered to give it much support, as evidence of a similar tendency in Greek antiquity. In the passage from the tenth century work quoted on p. 343 it is incredible that the childish fancies there accumulated can be literally taken from such a writer as Aristotle. Of the earlier "grammarians" Timaeus belongs to the third, Pollux to the second century A.D. I cannot determine the date of the respective scholia quoted above, but I will venture on the suggestion that, with the exception of the slightly obiter dicta from Aristotle's Athenian Constitution (the authenticity of which itself has been questioned) and the alleged quotation of him by the Lexicon Patmiacum, the only authority for any real parallel between the Athenian triads and those of the Roman Curiate system comes from a class of writers who might well be perfectly familiar with the latter, and who are by no means scrupulous about strict accuracy of citation as to the former. case particularly of Pollux, besides the probability suggested by Meier 136 (p. 344) that he, among other grammatici, makes the mistake of regarding a division as subordinate to that of the old "tribes," which was in point of fact only co-ordinate

 $^{^{134}}$ Aristotle, Pol. 3. 2. 3. πολλούς γάρ έφυλέτευσε ξένους καὶ δούλους μετοίκους.

¹³⁵ id. Const. Ath. 21. 2. δθεν έλέχθη και τό μή φυλοκρινεῖν πρὸς έξετάζειν τὰ γένη βουλομένους.

¹⁸⁶ Meier, § 3, p. 10.

with them, we see that, in the attempt to start with a triad, he has possibly manipulated his own traditional materials, in ignoring the son of Ion who is named by Herodotus (5. 66) as the ancestor of the less obviously explicable $\Gamma \epsilon \lambda \acute{\epsilon}o\nu\tau \epsilon s$ (or $T\epsilon \lambda \acute{\epsilon}o\nu\tau \epsilon s$).

Fundamental character of $\gamma \ell \nu \sigma s$ and $\phi \rho \alpha \tau \rho \ell a$. Too much time has, however, been spent on this seductive comparison of numbers. That of the fundamental character of the curiae and gentes with the Greek $\phi \rho \alpha \tau \rho \ell a$ and $\gamma \ell \nu \eta$ is not less interesting, and, as to the smaller association, more illustrative of the principle stated in § 1 (pp. 15, 16).

We may, I think, leave on one side the strange opinion of Meier, who, as I understand him, regards the $\gamma\acute{e}\nu o_{5}$ as, in its origin, purely artificial ¹³⁷. Some rearrangement of the old groups by Cleisthenes ¹³⁸ I believe, as suggested in the Roman parallel, to be possible, and in fact to account for the growth of so many circumstantial stories and elaborate systems. Such a fact is not inconsistent with the language of Aristotle (above, p. 343), nor with the systematic employment of $\gamma\acute{e}\nu o_{5}$ and $\phi\rho\alpha\tau\rho\acute{l}a$, in historic times, for conventional religious purposes, if not for a recognised registration system (see note 146). But to ignore the fundamental principle, real or fictitious, of relationship, seems an inconceivable blindness or an obstinate parti pris ¹³⁹.

On the original meaning of $\gamma \acute{e}\nu o\varsigma$ and $\phi \nu \lambda \acute{\eta}$ I have said enough (§ 5, p. 138, n. 5 and § 6, App. p. 252): that of $\phi \rho a\tau \rho \acute{\iota}a$ was undoubtedly, in its first acceptation, the brotherhood,

¹³⁷ Meier, § 13, pp. 23, 24, &c.

¹³⁶ See above, § 5, pp. 136, 137. Meier (§ 12, p. 22) seems to attribute this to Solon, or Theseus (§ 4, p. 12). But see Aristotle, Pol. 7. 4. 19.

¹⁸⁹ Such a theory, moreover, is inconsistent with Meier's own elaborate distinction (p. 25) between the γεννηται (gentiles) who are real relatives (δμογάλακτες) and those who are only participators in the same sacra, δργεώνες: see Photius, s.v. δργεώνες, ad finem.

from a root common to the Aryan languages generally ¹⁴⁰. The word indeed $\phi\rho\dot{\eta}\tau\eta\rho$ (= $\dot{a}\delta\epsilon\lambda\phi\dot{o}s$) has only antiquarian authority, and the derivative $\phi\rho\alpha\tau\rho\dot{l}a$, in ordinary Greek, has merely a legal or political meaning, the idea of assumed having, in the main, superseded that of a natural relationship.

άφρήτωρ. This modification of meaning must have begun as early as the Homeric poems, in which the belonging to no φρατρία is coupled with other penalties of abetting civil dissension, which explain it as being debarred from all social intercourse and even from the enjoyment of θέμις or justice ¹⁴¹. The passage of Homer is one of those which assume the existence of a larger whole, of which the φρατρία forms part; it also indicates a time when there was very little chance of a man's obtaining redress for wrong, unless he could rely upon the support of some such social connexion.

φρατρία and blood-feud. This "backing of one's friends," as a duty of the φράτορες comes in, by a side wind, in the speech against Macartatus written for the plaintiff Sositheus by Demosthenes 142. The direct object of the speech is a

140 Curtius, § 414, pp. 302, 303. The πατρίαι of Byzantium, assumed by Grote (1888, ii. p. 438, n. 1) from τά τε θιασωτικά και τὰ πατριωτικά of Aristotle (Oeconom. 2, 4) may be the φρατρίαι of that country. I rather take them for γένη, which may also be the case with Herodotus' Babylonian πατρίαι (1. 200), though Abicht takes the word to be simply Ionio for φρατρίαι. On the passage of Aristotle I do not see Grote's point as to the difference of θιασωτικά from πατριωτικά: their connexion rather seems to indicate the usual religious trend of the φρατρία. πάτρα, by the way, in the sense of common descent, once in Homer (Il. 13. 354), frequently in Pindar, is clearly much the same as γένος. In Nem. 8. 46 it is contrasted with the larger group φρατρία of the Χαριάδαι. See Böckh's Pindar, 2. i. p. 490.

141 Homer, Il. 9. 63.

άφρήτωρ άθέμιστος άνέστιος έστιν έκείνος δε πολέμου έραται έπιδημίου δκρυδεντος.

Horace's "sine gente," Sat. 2. 5. 15, may perhaps be compared.

142 Reiske, pp. 1069, 1070. The νόμοι quoted are, of course, public (? of Solon); to be distinguished from those mentioned by Isaeus, de Cironis hereditate, Oratt. Gr. vii. p. 208, which are merely special domestic customs of a particular φρατρία.

family inheritance; but the particular point of law, or custom sanctioned by law, to which I wish to call attention, is the necessity, failing relatives, for acceptance, by a certain number of the $\phi\rho\acute{a}\tau o\rho\epsilon$, of the satisfaction tendered by an involuntary homicide; which must take place before the latter can return to his native land or (semble) the land be freed from the curse of blood ¹⁴³. It is true that the latter part of this $\nu\acute{o}\mu os$ may be held to be confined to the duty of burial of the deceased, incumbent on his $\pi\rho os \acute{\eta}\kappa o\nu \tau es$ within the deme; but other passages ¹⁴⁴ seem to me to justify the connexion of the two things—the pacification of the avenger and the purification of the land.

A family register. The strong feeling of phratric relationship has been referred to already (§ 9, n. 30) with regard to the public affair of Arginusae. But, for more everyday occasions, these old associations continued, in quite historical Athenian times, to fulfil the purposes of a parish, and apparently also an electoral, register; their originally religious character being, however, never lost sight of. The εἰσφορά, for instance, of the γαμηλία, on a marriage, is not the introduction simply of the lady to the phratry, but the contribution of a θυσία, on her behalf 145. The speeches against Macartatus and Leochares are full of references to the introduction, or rather entry, of a child είς τους Φράτορας of a house (οίκος) as its representative: but there is always present the required sacrifice, though this would sometimes appear to be merged in the sacrificial feast: and it is always competent to the φράτορες to object

πατήρ. Demosthenes, contra Eubul. p. 1312.

¹⁴³ Compare the remarkably similar case of wergild, § 4, App., and the δίωξις of the cognati and gentiles, § 4, p. 123.

¹⁴⁴ See the speech πρὸς Πανταίνετον, p. 983, and κατὰ 'Αριστοκράτους, p. 645. The quaint provision for the case of ἐκούσιος φόνος in 646 is another matter.
145 τῶν φρατέρων τοὺς οἰκείους οἶς τὴν γαμηλίαν εἰσήνεγκεν ὑπὲρ τῆς μητρὸς ὁ

to such introduction, as unwarranted, by direct diversion of the sacrificial victim 146.

Here, besides Pollux, 3. 4, the interesting Scholium may be consulted on Aristophanes, Ranae, 797, which describes the sacrifice of a lamb, provided by a father, on the occasion of such introduction into the phratric circle. The lamb, apparently, should reach a certain weight, and the cry of "too light" ($\mu\epsilon\hat{\iota}o\nu$) indicates that this offering was sometimes perfunctorily and shabbily discharged ¹⁴⁷. Whether this sacrifice had any connexion with that made on the naming-day of the newly-born child is not clear ¹⁴⁸. But the very remarkable coincidence with the agnus curio of Plautus ¹⁴⁹ points to some similar sacrifice on a domestic occasion in a curia at Rome.

From these persistent usages, we may not unreasonably conclude that, when Cleisthenes is said (above, p. 342) to have left the $\gamma \acute{\epsilon} \nu \eta$, $\phi \rho a \tau \rho \acute{\iota} a \iota$, and hereditary priesthoods ($i \epsilon \rho \omega \sigma \acute{\nu} \nu a \iota$) untouched, this by no means precludes the possibility that he reorganised the system generally in connexion with his new tribes and with the possibly older demes 150; and, while he allowed certain aristocratic privileges,

¹⁴⁶ ἀπάγοντα τὸ Ιερείον ἀπὸ τοῦ βωμοῦ εἰ μὴ προσηκόντως εἰσήγετο ὁ παῖς.
Demosthenes, contra Macart. p. 1054.

¹⁴⁷ Bekker's Aristophanes, ii. 2, p. 387; v. p. 453: cf. Pollux, 3. 4 on φράτριος αξέ θυομένη τοῖς φράτορσων and on μειαγωγείν.

¹⁴⁸ I do not find any mention of the φράτερες in the Scholia on Aves, 494 or Lysist. 757, and shall not therefore go into any attempted explanation of the strange ceremony of ἀμφιβρόμα. On the Roman dies lustricus or nominalis see Macrob. 1. 16. 36. There is an account of the three days of the Apaturia in Schol. on Ach. 146 and Pax, 890. The legendary, and what is generally considered the true, explanation of the name will be found there. I venture to suggest, not so much the "Fathers' meeting" as that of the "Brothers by the same Father."

¹⁴⁹ See above, § 9, p. 322.

¹⁵⁰ To some such reorganisation, which could only, in exact detail, have been temporary (see Grote (1888), ii. p. 428: Msr. *3 iii. p. 92, &c.) we must refer such statements as those cited on pp. 345, 346: of which thirty $\gamma \epsilon \nu \eta$ to a

as a matter of religion, to subsist, facilitated the introduction of new family arrangements on the pattern of the old ones. Such a rearrangement has been assumed in the early Roman constitution: but it was evidently accompanied at Rome with the drawing of a strict line round the older gentes, which thus became the patrician order. Apart from this, neither the curiae nor their Greek parallel appear to retain much substantial importance. The requirement of a lex curiata was no doubt used, from time to time, as a party expedient, and the post of curio maximus was long a matter of aristocratic privilege: but neither he nor the τριττύαρχος of Plato (Rep. l.c. p. 342) seems to be of much more practical account than the magister curiae of Plautus above (§ 9, p. 330).

Differences from Roman case, Moyal. The rigid conservation of a Patriciate may possibly be traced to the stronger principles of parental power observed at Rome (with the result of a clearly defined agnatio), and these again to early facts of military service which had no direct parallel in Attica, see below, p. 353: but it must be confessed that here we are entering into the region of theory, in which we are obliged to leave so much of what has been said or suggested about the gentes and the curiate system. The idea of relationship, indeed, seems to have been stronger between the paropes than between the curiales. As a matter of fact the φρατρίαι were demonstrably associations of γένη and one would imagine that they would be named from the most prominent yépos in each. It is, therefore, disappointing to find that to the only title of an Athenian φρατρία, which has φρατρία is conceivable, thirty families to a γένος hardly so. As to the idea and the word reaxes being possibly borrowed from the militia companies of the Lyourgean system, see above, p. 335, n. 103. The expression & Transfor, and its explanation of μη μεταλαμβάνοντες, παίδες ή άγχιστείς, κλήρου τελευτήσαντός τινος 'Αθήνησιν are mere deductions from, not independent confirmations of, this identification of Tpeakes with yeves.

come down to us—the Achniadae—there is no corresponding gens or deme recorded ¹⁵¹. It is not worth while to invent an ' $\lambda \chi \nu \iota \epsilon \dot{\nu} \varsigma$: we may pass on to the $\gamma \dot{\epsilon} \nu \eta$, with the one remark that both $\phi \rho a \tau \rho \dot{\iota} a$ and $\gamma \dot{\epsilon} \nu o \varsigma$ seem to have had more opportunity of recording or contracting special customs of their own than the Roman similar institutions, if, at least, we are to give any weight to a note attributed to Proclus ¹⁵² on Hesiod, Op. et D. 491, that the individual $\gamma \dot{\epsilon} \nu \eta$ had, in their $\lambda \dot{\epsilon} \sigma \chi a \iota$, or small Parliaments, some practice of debate (and possibly joint action). But even Proclus' note makes the use of his $\lambda \dot{\epsilon} \sigma \chi a \iota$ distinctly connected with religion.

Origin and names of $\gamma \epsilon \nu \eta$. As to the origin of the Greek $\gamma \epsilon \nu o s$, it cannot reasonably be attributed, any more than its Roman parallel, to descent from any single ancestor (see § 5, p. 159). On looking through the list of names recorded and examined by Meier (pp. 37—54), we find, among a host of reputed patronymics, and a few possible real ones, many expressive of religious or ceremonial office, some of trade or occupation, some of special local habitation or produce, and a few of foreign race ¹⁵³. Original joint residence

151 Grote (1888), ii. p. 439, n. 2, compared with the lists of Attic gentes in Meier and demes in Ross. The Χαριάδαι of Pindar, Nem. 8. 46 are supposed by Böckh to be a φρατρία; the 'Ολιγαιθίδαι of Corinth were called a φρατρία by the Schol. on Pindar, Ol. 13. 137: others cited by Meier, p. 10, belong more probably to the γένη.

152 See however as to Proclus a full quotation of this note in Meier, p. 21, n. 73, also the authorities cited by Ameis on Homer, Od. 18. 329. In Etym. M. the $\lambda \ell \sigma \chi \eta$ is only a Boeotian club or ordinary. See s.v. p. 561 and $d\delta o \lambda \epsilon \sigma \chi (a, p. 18$. Curtius, p. 364, translates the word Sprech-halle but apparently considers its derivation from $\lambda \ell \gamma \omega$ not quite satisfactorily made out.

183 The first class are legion. Το the second may belong 'Αμυνανδρίδαι, 'Ανταγορίδαι, Ζευξαπτίδαι, Σπευσανδρίδαι, Τιμοδημίδαι; to the third εύμολπίδαι, κήρυκες, 'Ηφαιστίδαι, πραξιεργίδαι; to the fourth αίγειρότομοι, βουζύγοι, βουτάδαι, βουτώτοι, βρυτίδαι, δαιδαλίδαι, είρεσίδαι, εύπυρίδαι, παμβωτίδαι, ποιμενίδαι; to the fifth εὐνείδαι, έχελίδαι, θυμαιτάδαι, κειριάδαι, κροκωνίδαι, κωλιεῖς, κηφισεῖς, χαλχίδαι, λακκιάδαι, φρεωρύκοι: of the last φοίνικες is the only good instance that I can find: but all are mostly guess work. See Grote, ii. p. 436, n. 2.

may be fairly inferred in a majority of cases: but no one general principle can be confidently laid down.

Similar, or even vaguer conclusions, are all that can be drawn, from name and legend, in the case of the Demes. These were evidently old local districts or cantons, existing before the time of Cleisthenes, utilised by him in constituting his new political divisions 154. They apparently correspond with the κῶμαι or unfortified villages and hamlets in which we are told that the original inhabitants of Greece lived 155: all that is expressed by the words $\delta \hat{\eta} \mu o_{\gamma}$ and $\kappa \hat{\omega} \mu \eta$ being the enclosure of certain land and the habitual resort or repair of the villagers, for rest, to certain places 156. They are taken, by Meier and others, as resembling generally the Roman pagi (above, p. 326). Their names, which probably gave their quasi-patronymic style to so many of the yeun, are evidently derived largely from local legends of heroic exploit. The origin of such is pure matter of speculation. My own idea is that some striking natural feature in the first instance suggests either some entirely imaginary personal agent, or the agency of some obscurely remembered ancestor: from such associations, put into form by local fancy or ballad lore, the step is natural to a chieftain or ancestor worship: and from that, aided by the social instinct of joining together for mutual protection and sympathy, to the recognition of some common deity or progenitor. But this and the subsequent stages of further union are all matter of hypothesis.

¹⁵⁴ Above, p. 341, n. 118.

¹⁵⁵ Thucydides, 1. 5, 10.

¹⁵⁶ This explanation of δημος, accepted by Liddell and Scott (see too Donaldson, New Cratylus, p. 452), seems to me much superior and even more in agreement with the distinctive meaning "the common people" (Homer, Π. 2. 198 and Plutarch, Solon, c. 18) than the zugetheiltes Land of Curtius, p. 231. κώμη may, through a supposed κώμη, be connected with κείμαι (id. p. 145): to most judgements a direct identification with haim-s (Goth. = our home) will be preferable. The village feast κώμος, and its festal song, κωμφδία, are well-known memorials of this ancient life.

Differences in sequel. One point of difference between the Greek and the Roman beginnings of a Polity, rests upon slightly more ascertained, though simply traditional foundations. The Attic people is consistently represented as autochthonous: it does not depend for any of its characteristics, like the Roman, upon the survival of the early military system, which is connected with the name and the alleged deeds of Romulus. The parallel to that is to be found rather in the old legends of Dorian invasion, some testimony to which survives in the iron system of Lycurgus. Accordingly the developement of an aristocracy is somewhat less pronounced, and the line of demarcation less nigid than at Rome. The oppression of the poorer class is more exclusively connected with the monopoly of land, and the burden which Solon endeavours to relieve is not so conspicuously and primarily that of debt and personal bondage as of mortgage with public notice. His reform passes ultimately into a timocratic modification of the constitution like that of Servius, which is possibly copied from it. In the recrudescence, too, of faction, and the not uncommon result of the erection of a pretended democratic championship into a "tyranny," matters run much the same course in the two cases. But the sequel is different. On the abolition of Royalty, through the outrage of some younger member of the ruling dynasty, while the Attic constitution is permanently turned into a true democracy, as understood in ancient times, in the case of Rome the union against the common oppressor is very short-lived, if even developed to any extent, in the infant Republic; being almost immediately replaced by the long and successful aristocratic government, which we know so well.

Conclusion. Any attempt at closer comparison of this stage of "aggregation" in Rome, with apparent parallels elsewhere tends rather to indicate differences than resem-

blances. In spite of Dionysius' evident identification of the curia with the Phratry, I cannot find, in the former, any such clear belief in mutual relationship, as is of the essence in the Athenian institution.

In the original Teutonic invasion of England, the tendency of the settlers to gather together into tuns or villages may be superficially compared with the gathering of the Roman gentes into a curia. But, of what has been above regarded as the unificatory principle in the curia (above, pp. 308—310) I find no surviving trace in the tun¹⁵⁷. Such a principle may conceivably have had its effect in the early pagan times, when the worship of some central or unitarian deity has been remarked as exercising an adverse influence on that of "tribal deities or deified ancestors¹⁵⁸" and in the case of Rome, I should say, "of local or particular cults¹⁵⁹." But any such primeval bond of union is entirely submerged, under the general Christian conversion, long before any tun comes into our ken¹⁶⁰.

There is on the other hand, in the Athenian associations, which spring apparently, in the first instance, from local worship (above, p. 352), the $\phi\rho\alpha\tau\rho\dot{\alpha}$ and the Deme, an obvious survival, to historic times, of the rules and usages of these associations, as a register of relationship, not only for purposes of the descent of family representation, but of the pursuit of blood-feud which is connected with such representation. The ultimate admission of the $\phi\rho\dot{\alpha}\tau\epsilon\rho\epsilon$ to this duty, or privilege, may be compared with the exceptional admission, to the same, of the unrelated gegyldan, in the

¹⁵⁷ In this respect Vinogradoff (Manor, pp. 146, 147) distinguishes the early Saxons from the Celtic tribesmen, who follow rather the Roman principle in its agnatic stage (see above, § 4, pp. 112, 113).

¹⁵⁸ See Phillpotts, pp. 271, 272. Also above, § 4 and below, § 11.

¹⁸⁹ Such, for instance, as are mentioned in Cnut, 2. 5. But see Prol. to Wihtraed's Gesetze, and generally Kemble, i. App. F.

¹⁶⁰ At least before our earliest records See Aethelbirht's Laws.

Anglo-Saxon laws (see § 4, p. 116 and App. p. 132), though the root of the whole matter, in the necessary purification of the land, from the curse of even involuntary slaughter, is traceable only in the Greek case (see above, p. 348).

The view generally advanced in this and preceding sections differs from that of Mommsen, who admits the religious character of the early associations, which form the foundation of such a Polity as the Roman, only in that he appears to regard their political aspect as original and contemporary with a distinct religious one¹⁶¹; whereas, in the theory which I have ventured to maintain, the former is secondary and developed out of the latter. See more fully the treatment of the institution of Sovereignty in §§ 11—12.

161 Msr.3 iii. pp. 125, 126

§ 10. THE COMITIA CURIATA

The Aryan popular assembly, p. 357. Romulian populus, ib. Names of populus, &c., ib. The comitia of Romulus, 359. Curiata, not military, ib. Forms of procedure, 361. Alleged democratic character, 362. Patrician checks, ib. Sanction of patres, ib. Auspices, 363. Comitia at first exclusively patrician, ib. Functions, (1)? Military, 364. (2) Regarding matters of religion and family, 366. Inauguratio, ib. Calata comitia, ib. Lex curiata, 367. De imperio, 368. Lex curiata under Republic, 369. The thirty lictors, 370. Auspiciorum causâ, 371. Form of lex, ib. Its antiquity, 372. Lex regia, ib. Lex de imperio Vespasiani, 373. Arrogatio, ib. Other semi-legislative acts of comitia, 376. Generalities of Livy and Dionysius, ib. As to functions electoral, 377. Judicial, 382. Legislative, ib. Conclusion, 383.

In the preceding attempt to describe the original constituent elements of the Roman Polity, I have left, to the last, one which traditionally plays a great part in the developement of that coping stone of the first Roman State—a real and general Sovereignty. The comitia or national assembly, to which I refer, has obviously its apparent parallels in other Aryan stocks; but we shall, as obviously, expect to find its general character much modified, in the particular instance under our consideration, by the peculiar Roman characteristics of its original units and by the main motive or ruling principle in the coalition of their individual members. A few general statements, which were once almost universally accepted, but are now matter of some question, may be briefly stated here.

The Aryan popular Assembly. A recognised meeting of the free adult males of a nascent political community, generally coupled with the existence of a Senate, was held to appear in our earliest records of the Teutonic race¹, as well as in most other branches of the great Aryan stock. It is wanting, as a rule, in India, a fact for which Maine accounts by the unwarlike character of the Indian². The exception is significant, and I think it will be found that in other cases, as well as that of the old Germans, the early popular assembly is solely a gathering of warriors under a tribal military chief (see § 12). We may assume, or we may deny (for it is merely hypothetical), the existence of such a tribunus in an ancient single Romulian tribe: we only catch our first sight of such an officer, in our traditional accounts of the united Roman populus, as already a subordinate.

The composition of that particular populus, as made up of three tribes, has been supposed in the section on tribus (p. 245) to be due to such special causes that it is useless to seek parallels in other European nationalities. For the general idea of a people we do get some suggestions from comparative philology in a significant, if somewhat negative, agreement of the various names for that idea. The plural styles of a tribe or nation, which describe the members as individuals, vary indefinitely, as we have seen (§ 6, p. 254), according to the characteristic selected, for note, by themselves or their neighbours. (I am speaking, of course, of names which have a probable definite meaning, even when they are disguised as patronymics, from a supposed common ancestor, of obviously later invention, like Aeolus, Dorus, Ion, &c.). The singular words, on the other hand, by which a people is generically designated, vary much less. In a

¹ Freeman, N. C. ch. 3, § 2 and ll.cc. in Stubbs, C. H. ch. 2, § 16: but see Chadwick, Origin of the English Nation, pp. 154, 155, nor is there any reference to such an assembly in P. and M. ch. 1.

² Village Comm. p. 124.

numerous class, the meaning of such names is simply the multitude, probably as opposed to the smaller council. The Roman word populus, although connected, in a very old phrase, with warlike array (see § 6, p. 243), does not seem, in itself, to indicate more than this, like plebs and many other words from the same original root, including the Greek $\pi \delta \lambda \iota_{\S}$ and the Teutonic folc³. Bulk is the not very different signification of a smaller group of words⁴.

In treating of the earliest Roman national assembly I shall of course endeavour, as elsewhere, to work back from the known to the unknown, and shall accordingly begin with the practice and constitution of the comitia curiata, in its organised form, as surviving to historical times. But I shall also here consider myself justified in drawing a certain amount of inference from early legend, instead of disregarding it altogether, as pure fiction or copy of foreign matter. A much lesser amount, rather of illustration than of inference, may be allowed to the adducing of parallels from other nations of the same Indo-European stock.

³ For plebs see § 7, p. 260. Το πόλις a special political meaning has been attached and special theories based upon it, even by the ancients themselves. See the passages of Plato, Aristotle and Xenophon cited by Grote (1888), ii. p. 187 and compare Curtius⁵, p. 79: for the derivation of πόλις, id. p. 281. I do not understand Corssen's omission of the word from his string of derivatives from par- pra- (which includes populus and fole), i.² pp. 368, 442. In its earlier poetical use, πόλις means simply town or city, as distinguished from the general meaning of residence expressed by ἄστυ (Curtius, p. 206): but the meaning given in the text is supported by too many parallels to leave much doubt.

⁴ Touto or touta appears in the sense of a whole people, in the Eugubine tables and other Oscan or Umbrian terms and inscriptions. It is derived by Corssen²(i. p. 171) from a root tu, wachsen (Curtius, p. 226, Macht haben). The Gothic cognate is thiuda, which we first find, in our own Teutonic group, in the adjectival form thiudisc, modern Deutsch (see Kluge, s.v.) belonging to the people (as distinguished from foreigners, see § 6, App. p. 254). The Anglo-Saxon form is théod.

The comitia of Romulus. The alleged institution of the hero-founder, and the elaborate constitutional system which comes spick and span from his genius, like Athene from the head of Zeus, are of course open to the same suspicion as the alleged similar origin for other elements of the Roman polity already considered-elements which bear more intrinsic evidence of automatic or "natural" growth: and the striking numerical symmetry, which was undoubtedly retained under the historical Republic, appears to require personal design, in some rearrangement, at least, of elements which must originally have combined together in a more irregular self-formed union. It is the gradual developement of a power capable of such regulation or reorganisation, and the connexion of that power with religion as a unifying influence, which will form the principal subject of the following sections on the approximations to Roman Sovereignty.

Curiate assembly not military. The body better known to us, which in the main superseded the comitia curiata, had no doubt a distinctly military character: but whether that character can be reasonably inferred for the earlier organised assembly seems to me to depend on so little Roman evidence (below, pp. 364, 365 and § 12) that it would be extremely presumptuous to make that inference on the strength of a supposed general institution of other early peoples (above, p. 357), in which there is by no means the universal belief which once obtained; as against the idea, for which there is respectable antiquarian evidence, of an original non-military object in its constituent elements (§ 9, p. 308). And, even if a military utilisation of the curiae can be accepted as true, it must be conceived as modified by the feeling of family connexion, which cannot have been entirely absent from the original curia; though it did not exist in the same strength as in the parallel Greek φρατρία, where indeed it seems almost to replace the religious

bond, which has been suggested as the main foundation of the Roman association (see § 9, pp. 309, 311 and App. to § 9, p. 354).

Our information as to the individual members composing the primal Roman assembly is so slight that the most varying theories have been advanced, without much chance of positive disproof. Jhering, for instance, regarding it as a Host, represents it as excluding the old, because incapable of military service; which is I think in accordance with the general view of Mommsen⁵. Others consider that while the paterfamilias of the most advanced age was a member, the son under power, though in the prime of his vigour, was not. Pupilli, we know, could not be arrogated before the reign of Antoninus⁶, and we may fairly assume that they could not belong to the arrogating body: but their case is not conclusive as to the case of the adult filius familias.

This variance appears to arise from a confusion of the hypothetical tribal muster of a Host, which may be inferred for most of the Aryan nations in their infancy, and the first organised assembly of the Roman populus as a whole. Leaving therefore, these general and unsatisfactorily à priori suggestions, let us proceed to enquire what special light we can get, from recorded usage, upon the constitution and the powers of the oldest organised popular assembly of Rome, and what were the reasons for its replacement by another. We must evidently consider in the first place the particular forms of procedure and kinds of business with which we find this assembly historically connected, by the evidence of surviving practice; and only in the second place the more general functions so freely attributed to the comitia by our historians (below, p. 376).

The assembly as Curiata. The first meetings of the Roman People which were of any public, or what we may

⁵ Jhering⁵, i. p 249: Msr.³ iii. p. 103.
⁶ Ulpian, 8. 5.

call official, character, i.e. which were recognised as capable of taking some authoritative action, were, in accordance with all early history or legend, organised by curiae, and these composed of gentes, originally patrician. The gradual admission of Plebeians, or the question of their forming, from the first, a constituent part of this body, has been considered above (§ 9, pp. 317, 318). I shall assume, for the present, that this assembly was once predominantly, if not exclusively, patrician, and proceed to a consideration of such forms and objects of the body as are not directly affected by a possible admixture of the plebeian element.

Forms of procedure. Of the mode of voting in the comitia curiata, in historical or quasi-historical times, we know but little. We gather that each curia gave one vote, a curia selected by lot being called the principium. It has generally been held that the principium was the curia which publicly voted first, but this view has been, I think, successfully contested by Mommsen? who holds that the priority merely refers to the ultimate declaration of the vote, all being taken at the same time, in the curiate, as in the later tribal assembly. Actual priority of voting was peculiar to the centuriate assembly, in which the advantages given to the wealthier classes were to a certain extent due to a fixed order of voting, at least as between class and class (see below, § 16).

As to how the vote of a curia was settled, our only light is that thrown by Laelius Felix, a jurist of the time of Hadrian, who tells us that at the comitia curiata votes were given ex generibus hominum⁸, which, according to a not very

⁷ Msr.³ iii. pp. 397, 398, 411. Compare Dionysius, 4. 20 and Livy, 9. 38.
⁸ Gellius, 15. 27. This passage is not noticed in Seeley's description of the "manner of proceeding" at the comitia curiata, p. 69³, though the gentile composition of the curiae is admitted at the bottom of p. 60. See below, p. 366.

uncommon use of genus, is, by most authors, taken to mean according to gentes.

As to how the vote of the gens was settled: apparently every paterfamilias—that is every independent male adult—had an equal voice, the vote of the rich man being as that of the poor⁹. In this lies the important difference from the voting under the Servian Centuriate system, to which Livy expressly calls attention¹⁰. His words, taken literally, would indeed go so far as to give the vote, under the curiae, to every man (viritim), but I think this must be limited to every independent male.

Alleged democratic character. The above comparison somewhat explains the surprising democratic character attributed by our early historical authorities to the curiate assembly, unless that attribution be due to pure fancy, or to the inclusion of unattached Plebeians within the curiae, as local districts, which must have been the case in the early tribunicial elections¹¹. I refer to passages of Cicero and Livy in which the populus of the comitia curiata is opposed to the patres, and even identified with the Plebs¹².

With Dionysius, too, the Curiate assembly is occasionally styled the $\delta\hat{\eta}\mu$ os or $\delta\eta\mu$ o $\tau\iota\kappa\hat{\sigma}\nu$ $\pi\lambda\hat{\eta}\theta$ os, perhaps including patricians, but certainly opposed to the β o $\nu\lambda\hat{\eta}$ as an exclusively patrician Senate¹³.

Patrician checks. Whether truly appreciated as democratic or not, the proceedings of the comitia curiata, as an assembly, were subject to important checks, employed directly in the aristocratic interest. The auctoritas patrum, or sanction of the Fathers, required for any

10 Livy, 1. 43.

⁹ Dionysius, 4. 20.

¹¹ See § 9, p. 320.

¹² Cicero, de Rep. 2. 12. 23; 13. 25; 21. 38. Livy, 1. 17 (where however the word *sciscerent* is an anachronism, as remarked by Seeley², p. 132), 22, 32, 41. 49.

¹⁸ Dionysius, 2. 14; 4. 10.

measures carried by or proposed to it (see below, p. 377) acquires another meaning in later times, where the constitution both of the Senate and the popular assembly were materially altered. At the earlier time now under consideration the patres whose sanction was required were none other than the purely patrician Senate. There may be some question whether this check applied equally to all business which came before the comitia curiata and more particularly whether the consent of the $\beta ou\lambda \dot{\eta}$ was originally required as a ratification or an initiative 14. But the original importance of this particular check may be exaggerated, if my view as to the composition of the old comitia itself be correct (see below).

There was also the chance of stoppage by unfavourable Auspices, to which the curiate vote was in all cases specially subject (below, § 14, p. 440), the augurs by whom these auspices were taken being exclusively patrician till the lex Ogulnia of 300 B.c., and the manipulation of this check, for political purposes, too tempting to be resisted (see § 14, p. 443, n. 46). The observation of favourable auspices is, we may note, made a point of in Cicero's account of the election of the first ten plebeian tribunes as distinguished from the irregular appointment of the first two or five 15.

Here I may be pardoned for a slight digression to express my own belief, which was that of Niebuhr, that the *comitia* curiata was, in its first institution, distinctly and exclusively patrician. That it was always so, I think is matter of very considerable question: I am thinking of it as it existed under the first real Sovereign, most probably the first

¹⁴ Compare Dionysius, 2. 14, 60 and 6. 90 with 9. 41.

¹⁵ See fr. 48 (Müller) of Cicero's speech pro Cornelio, r. (Asconius in Cornelianum, p. 68). Compare however Livy, 2. 33 and Dionysius, 6. 89 neither of whom says anything about the auspices, though the latter specifies the curiate assembly as electing the first tribunes, five in number. See generally Mommsen, Forsch. i. p. 183, n. 14, p. 186, n. 17 and Livy, 2. 56.

Tarquinius. Nor do I consider that this view is, in reality, so positively denied by the great authority of Mommsen, as alleged by Seeley. The string of arguments urged by the latter writer in his Livy, Book I (all unhappily that he was able to complete) will be examined hereafter, on the occasions to which they particularly refer. But as to the passage of Livy which he finally cites as conclusively in favour of his view, I may be allowed here to make one remark. Livy, 1. 17. 8 may seem to prove that populus includes the Plebs; but the irregular use of the word sciscerent in the final section of this chapter (see Seeley2, p. 132, n. 10) is enough to shew that Livy is influenced by his recollections of the later Plebs which was distinctly opposed to the later Senate. This passage alone therefore is (pace Madvig) not conclusive on the question of the old comitia curiata being exclusively patrician.

Functions. (1) P Military. I have now to speak in more detail of the functions of the *comitia curiata*, as an organised national assembly, which can be inferred, with reasonable certainty, for the earliest period of its existence.

I take first the military purposes, to which reference has been made above (p. 357), because this employment of the members constituting the assembly is very questionable, and in any case was probably the first to disappear as matter of actual use.

The supposition of a curiate muster or array depends mainly upon an early part of the Romulian legend according to Dionysius, which represents certain original decuriones as military commanders, under Romulus, of divisions of curiae; all this being in my mind a piece of mistaken archaeology¹⁶. There were decuriones existing in Dionysius' time, and doubtless known to him, of the civil character described in a previous section (§ 8, p. 288), where a caution was entered

¹⁶ Dionysius, 2. 7.

against the confusion of curio and decurio. Whether these were descended from some original organisation of the old Senate, or no, is matter of question. They were certainly not military officers 16a. But the identification with Romulus' supposed captains is quite intelligible. I may add that the actual use of the curiate system in military service, not intrinsically improbable, is supported by the tradition of the testamentum in procinctu (see § 14, p. 445); possibly by the description of the populus in the old Salian hymn (§ 6, n. 28)16b.

In taking leave of Romulus with his three tribes, thirty curiae, &c. and their thirty decurions, I may repeat a remark which I must have made before, i.e. that in reputed original constitutions symmetry is almost as fatal an objection as the eponymous founder. Such principles as we can infer from historical survival are clearly matter of gradual formation, use and disuse, not conceivable as a cut and dried original scheme (see below, p. 376), like that of some parvenu modern nationality. A personal hand may it is true be indicated in the way of a rearrangement such as may, it is suggested, be attributed to Tarquinius Priscus, but the growth of such components as gens and curia must be assumed previously. Whatever reappearance may be traced in the comitia curiata of the arrangements of an army I should myself venture to regard as the revival of some old natural order of an original invading Host, most likely the work of the first Tarquinian King, which was so soon to be superseded by the elaborate system of the second¹⁷.

^{16a} Nor priestly ones (§ 9, pp. 309, 310); but see Msr.³ iii. p. 104, n. 5 and Jhering, i. pp. 248, 249 and the strange n. 25 on p. 116. The passage of Livy on which Seeley², p. 62, relies "comitia curiata quae rem militarem continent" (5. 52) is explained by ib. 9. 38 as merely referring to the *lex curiata de imperio*. See below, p. 368.

¹⁸b The armature pilumnoe is somewhat of an anticipation (see Livy, 7. 41; 8. 9, &c.).

¹⁷ See § 6, pp. 245—248 and Msr.³ iii. pp. 103—105, 109, 110.

(2) Regarding matters of religion and family. But my present object is rather to shew the connexion of this primitive assembly with *religion*, a matter more fully treated in a subsequent section on the functions of the Pontiffs, mainly as presiding over certain meetings of the members of the *comitia*.

The popular worship of Rome would appear to have been possibly developed out of, as it may elsewhere have superseded¹⁸, those sacra which were the main bond of the gens, and indirectly of the curia as an association of gentes¹⁹. To this general feeling may be referred much of early family law, which was dependent on transactions before the meetings above mentioned under the presidence of the Pontiffs. The same religious feeling also required the cooperation of the original assembly in the ceremonial admission to office of its chief religious officers (including its first genuine Sovereign), on which I shall now proceed to speak, but which is somewhat more fully treated in a later section.

Inauguratio properly belongs to the religious functions of the Pontiffs, and will therefore be principally considered under that head (see § 14, p. 437). It is mentioned here on account of its close connexion with the lex curiata which is reported to have been originally passed, in regular form as a law, by the curiate assembly, at the inauguration of the King and other high religious officers, and was historically retained, at least in form, for the annual entrance upon office even of the secular Magistrates in the Republic.

Calata comitia. The assemblies, however, of the People which were connected, by our main authority, with inauguratio, were known by another name indicative of special summons by a curiate officer, calator 19 a. The

¹⁸ See § 4, App. p. 134.
¹⁹ See § 5, pp. 139, 143; § 9, p. 316.

¹⁹⁸ See § 14, p. 433. This is the literal meaning of the word calata. Its force, in practical use, is variously given by Mommsen. At one time, relying apparently on the contions of Gellius (§ 14, n. 30), he considers the

description of them is quoted, from Labeo, by an antiquarian law commentator of the Early Empire²⁰, evidently as something which, though retained as a matter of form, was in substance obsolete, and so required explanation.

These comitia calata which, though formal in later times, were no doubt once a reality, were, in the first instance, assemblies of the curiae, but their use was, as we are told, extended to the centuries also. We have no direct evidence for assorting their employment to the one or the other constitutional assembly for particular purposes: but the ingenious suggestion of Mommsen seems highly probable that it was specially for the Flamen Martialis that his inauguratio took place in the Campus Martius, the natural locale of centuriata, as military, assemblies²¹.

Inauguratio proper, however, will, as I have said, be considered more hereafter. The matter to which I wish at present to call attention is the *lex curiata* and the action of the *populus* in that respect, of which the true *legislative* character is, I agree with Mommsen, much to be questioned ²².

Lex Curiata. The conception which we owe to Cicero of the original object of this ceremony imputes to the Roman People a strange indecision and changeableness. The lex curiata is represented as a sort of repeated election, held in order to give the People an opportunity of going back upon their previous choice: they are actually to meet again for no other purpose than to confirm or annul an appointment already made by themselves²³. It will take

meetings in question to have been simply for non-legislative purposes (Msr.³ ii. p. 37, n. 4, but see ib. iii. p. 39, n. 1 ad finem). But on the whole he, I think rightly, concludes the ultimate significance of the term to be merely Pontifical summons and presidence, so that the comitia for arrogatio may be properly called not only curiate but calata (Msr. ii. p. 38, n. 1).

²⁰ Laclius Felix, ap. Gell. 15. 27. See n. 30 in § 14, and Sources, p. 126.

²¹ Msr. iii. p. 307, n. 1. ²² Msr. ii. p. 37.

²² Cicero, de leg. agr. 2. 11. 26. The passage is given in full by Seeley² (p. 66) who apparently sees no absurdity in all this, though he distinctly

a great deal of Cicero's Blackstonian complacence to persuade one of this.

On the other hand, there is a reasonable probability in the view taken by Mommsen of the *lex curiata* as to its original intention—that it was a requisition and pledge of allegiance, from a popular assembly, to a ruler whose nomination, if not his actual appointment, had already been made by some other body²⁴. It was retained under the Republic, although there had now *really* been a previous popular election of the magistrates, by the centuriate assembly.

Lex curiata de imperio. On the style lex regia, and the designation of this measure as a lex at all, I have to speak hereafter. At present I wish to say a few words on , the fact of its being regularly called a lex de imperio. This may be somewhat misleading, as it would seem to confine the measure to military matters, in which light it was perhaps regarded by Jhering²⁵. Imperium, in connexion with the army, was no doubt an important political power, including as it did that of summoning and presiding over the comitia centuriata, which assembly was the people, as an army or military muster26, but we must remark that the want of a lex curiata is also stated by Dio as precluding all judicial identifies the populus with the comitia curiata. The passage cited by him directly afterwards, from the pro Plancio, refers to the old auctoritas patrum required after the comitial vote, which lost its force by being placed before. It has nothing to do with the lex curiata.

²⁴ Msr³. i. p. 611; ii. p. 7; Hist. (Dickson, 1901), i. pp. 81, 83. He compares the so-called *lex*, which is not strictly a *Volksbeschluss*, with the modern *Huldigung*, Oath of Allegiance.

²⁵ Jhering⁸, i. p. 251.

²⁶ Cicero, de leg. agr. 2. 12. 30, makes want of the *lex* merely a disqualification for *military* command. But the Consuls with the Pompeian party at Thessalonica, 48 B.C. refrained from holding the elections *generally* (Dio Cassius, 39. 19: see Seeley, Livy², p. 55) because they had not been able to renew the *lex curiata*. (Seeley translates εἰσενηνόχεσαν "had not received," but see the words which follow in Dio.) I would suggest the essentially *local* character of the original *curiae* as the reason for their difficulty. See § 2 of Dio's chapter and below, n. 37.

proceedings²⁷, and the mere existence of the well-known phrase judicium imperio continens (ending, or more strictly continuous with, the magistrate's term of office)28, is against such narrow view of imperium. The term is in fact applied to all the higher magistracies-King, Dictator, Consul and Praetor²⁹. The engagement, moreover, of obedience by the People, is to the potestas of the lower magistrate, as well as to the imperium of the higher 30, and the lex curiata applies to all the regular incoming officers of the year, although it can only be proposed, for the rest, by one of them who has power to deal with the curiae³¹. The exceptional case of the censor, for whom the lex, ordinarily curiata, was passed at the centuriate assembly, was I suppose due to the register of that body being considered as his peculiar province 32. See also, as to the inauguratio of the Flamen Martialis above, p. 367 and § 14, p. 437.

The comitia and lex curiata under the Republic. Whatever reality of electoral power (see below, pp. 377 et sqq.) the comitia curiata may have possessed under the Kings, had passed generally, at the commencement of the Republic, to the later assembly of the centuries. In one exceptional case, the earlier tribunes of the Plebs appear to have been elected by a curiate assembly of the whole People, though it has

²⁷ Dio, 39. 19. See Msr.³ i. p. 610, n. 4. The obstacle, however, in this case, was a veto of Clodius.

 $^{^{28}}$ In spite of Gaius, 4. 103, 105, I cannot bring myself to translate this phrase in \S 106 as a passive.

²⁹ Msr. i. pp. 22, 23. E.g. Livy 5. 46; 9. 38.

³⁰ As to the phrase imperium et potestas, while I agree with Mommsen to leave the former word as not yet fully explained (l.c.), I think the distinction between power simply (whether in exercise of a commission or not), and power to effect a result through the instrumentality of another (compare imperium with indicere) meets the case fairly well (lediglich passt). As to a lex curiata for the Royal quaestores paricidii or dumnviri perduellionis, see below, pp. 380, 381 and § 15, pp. 467.

⁸¹ Msr. i. pp. 610, 613. See Livy, ll.cc.

³² Cicero, de leg. agr. 2. 11. 26.

been held, as will be pointed out hereafter, that none but Plebeians could take part in these elections, which were, anyhow, very shortly transferred to the Servian tribes³³.

The quasi-comitia held for various sacerdotal elections, a subject too difficult of explanation to be anticipated here, have also to do with a modified form of the centuriate and later tribal systems34. In these quasi-comitia moreover, the election was a reality, there being keen competition. But this was not the case with the comitia at which the lex curiata was put, and carried as a matter of course, by the chief magistrate for the year, who had already been otherwise appointed (below, p. 379). It does not appear that the imperium and potestas accepted by the lex curiata were in any case regarded as originally conferred by that ceremony, and having no existence without it; but only that each particular magistracy, lacking this sanction, was not justus, strictly or legally complete, and as such was liable to be questioned by political antagonists³⁵. On the form of the so-called lex see below (p. 379): the business, evidently, from the inauspicious result of its absence, of a religious character, was most probably under the management of the pontiffs and augurs.

The thirty lictors. An imaginary representation of the *curiae* by thirty lictors, of which Cicero tells us³⁶ (see below, p. 379), in the year of his Consulship (63 B.C.), as a

²³ See above, § 9, p. 319 and generally Msr. 3 iii. p. 151.

³⁴ Livy, 25. 5 (212 B.C.); 40. 42 (180 B.C.).

³⁵ In the long list of ceremonies neglected by C. Flaminius, on his inauspicious campaign which ended at Thrasymenus, the comitia curiata, it is true, are not mentioned, but the absence of Flaminius die initi magistratus would, of course, preclude his holding them (Livy, 21. 63 and the beginning of 22. 1). See also the distinction between bare magistratus and magistratus justus in Gellius, 13. 15. 4 ad finem.

³⁶ Cicero, de leg. agr. 2. 12. 31. illis (comitiis) ad speciem atque ad usurpationem vetustatis per xxx lictores, auspiciorum causa, adumbratis. See Karlowa, ii. p. 850.

regular institution, auspiciorum causa, may possibly have begun in the year 214 B.C. when the proximity of Hannibal rendered it impossible for the comitia to be regularly held. The above date, however, rests entirely upon a conjectural emendation, by Rubino, of a mutilated passage in Festus, which is adopted by Müller but rejected both by Bergk and Mommsen, who again differ from one another as to its restoration³⁷. The last author (Mommsen) supplies the lacuna from an entirely different point of view, supposing the passage to refer to a dispensation introduced, at the date specified, from the necessity of repeating the lex curiata when two similar imperia followed one another, in the same person, without interval. This, however, seems rather to be the effect of a lex Cornelia, attributed to Sulla, which allowed the imperium of a consul or praetor to be extended to the same officer, within the province which he took as pro-consul or pro-praetor, by bare resolution of the Senate³⁸.

The continuance, clearly, of this ancient sanction had come, at the end of the Republic, to be purely a matter of religious ceremony, and its occasional obstruction, by tribunicial interferences or otherwise, was a mere party move, patrician or anti-patrician so long as the Pontiffs and Augurs remained exclusively patrician, afterwards conservative or anti-conservative. See above, n. 26; and § 14, n. 46. For the further history of lex curiata in arrogatio, below, p. 375.

As to the actual form of this lex curiata we have no information, but may suppose that it was put to and accepted by the assembly or its representatives, whether through a

³⁷ Festus, F. pp. 351, 352, Triginta lictoribus, and Müller's Suppl. p. 412. Msr. ³ i. p. 613, n. 3. Livy (24. 9) seems to regard the irregularity of the proceedings as consisting in the absence of Marcellus, one of the Consuls. But neither he nor Mommsen is quite clear, and I think there is much to be said for Rubino's suggestion that the representation by lictors was due to the proper members of the curiae being absent from Rome on service.

³⁸ See Cicero, ad fam. 1. 9. 25; 3. 10. 6, and Orelli's Cicero, vol. viii. Index legum, on L. Cornelia de provinciis ordinandis.

formal vote or not, like the form of arrogatio preserved by Gellius (5. 18. 9); and was not merely a one-sided declaration, as the detestatio sacrorum (§ 14, p. 444) probably was. Although therefore it is, in fact, unreal as a matter of actual legislation, it is not necessary in this case to fall back upon the most probable derivation and original meaning of the word lex (as connected with $\lambda \acute{e}\gamma \epsilon \iota \nu$) and treat the lex curiata simply as a declaration or proclamation; which does seem to be necessary in the case of the lex mancipi and possibly in that of regiae leges as compared with the lex publica of the Republic (i.e. the Twelve Tables), see Jurisprudence, i. p. 321.

The term *lex curiata* is, as we have seen, well-known to the writers of the Ciceronian and Augustan period: it is treated as descending from the Regal period by Tacitus³⁹, and the particular "law" seems to be referred to by Gaius⁴⁰ though not under the above specific name. A few last words may be devoted to the style by which it had come to be known in the time of Justinian⁴¹.

Lex Regia. The singular name by which this quasistatutory proceeding came to be known in late Imperial times, lex regia, may be due to an interpolation of Asiatic or Byzantine adulation into the text of Ulpian's Institutes⁴². If it is Ulpian's own, I am less inclined to attribute it to his Syrian blood (as Mommsen), than to an interpretation of ancient Roman custom quite consistent with Republican practice. The lex curiata, descending, according to all tradition from the Royal period, continued, in the Republican, to be regularly proposed by the highest magistrate concerned, which magistrate, during the Kingdom, was certainly the

Taoitus, Ann. 11. 22. This evidence is of course to be treated more fully in *Regiae leges*, under the head of *quaestores parricidii*. See § 18, p. 591.

40 Gaius, 1. 5.

41 Just. 1, 2. 6.

⁴² See Msr³. ii. p. 876, n. 2, comparing Ulpian, Dig. 1. 4. 1 with Cod. J. 1. 17.

 Karlowa (i. p. 495) treats the words attributed to Ulpian, without hesitation, as an interpolation.

King. It is as having been proposed, in its first usage, by the King, that I take the *lex curiata* to have been called *lex regia*⁴³.

The lex de imperio Vespasiani, which is preserved to us on a bronze tablet in the Capitoline Museum⁴⁴, is, according to Mommsen, a Senatus-consultum, a mode of enactment which was originally to be followed and completed by a lex properly so-called, but had long obtained an independent validity⁴⁵. It confers the powers comprised in it by reference to previous leges or rogationes passed in the case of Augustus and his successors. These we may assume to have been carried, in regular form, before a nominal comitia curiata. But we have no record of any such individual act, and the cumulative functions of Imperial Sovereignty do not seem to have been formally granted uno ictu until the time of Alexander Severus⁴⁶.

To pass to another more clearly legislative act of the same assembly, Arrogatio—a matter of Private Law, according to our modern view of it—is more important as bearing on the functions of the Pontiffs than on those of the comitia curiata, and will therefore be treated more fully in a later section (§ 14). In its primary and direct signification, however, this is the transfer of an adult and independent citizen, of course with his own consent, into the patria potestas of another. It can only therefore take place, as Gaius tells us, populi auctoritate, under the sanction of a regular lex, the rogatio for which is given in the usual Republican form by Gellius⁴⁷. We might describe this roughly,

⁴⁸ On the analogy of *lex tribunicia*, &c. I do not exactly know whether I can claim the support of Prof. Goudy for this view or not. Muirhead⁸; p. 287, p. 11.

⁴⁴ Bruns', p. 202. See Mer. ii. p. 878, n. 1.

⁴⁵ See, in a later part of this work, the article on the independent legislation of the Senate.

⁴⁴ Lampridius, Alex. Sev. 1. 3-2. 1.

⁴⁷ Gaius, 1. 99: Gellins, 5. 19. 4, 9.

as a Private Act of Parliament, almost in Mommsen's words ⁴⁸. It is a thing not to be done rashly, we are told, or without enquiry: a legislative assembly (comitia) is provided for it—that which is called curiata—under the presidency of the Pontiffs, and the facts are to be investigated, which are set out hereafter in § 14, pp. 442, 443. The meaning and object of the enquiry will be considered there: the function of the comitia, which is our present object, appears to be simply that of ordinary legislation, although the expression of Gellius "which are called curiata" (l.c. § 6) points to the representation of this assembly as having, in the writer's time, long become merely formal (above, p. 371). As to its being a calatum comitium, see p. 366, n. 19^a.

Originally any competence for arrogatio, active or passive, allowed to a Plebeian, must have depended upon his family having attained the quasi-gentile organisation and recognition referred to above⁴⁹. Gaius' expression (l.c.) auctoritas populi would apply to an act of either the curiae or the centuriae, and the form given by Gellius is framed on that of the ordinary legislation in the latter assembly. But the lex curiata was the form actually adopted in the time of Augustus and preserved, in constitutional theory, for 300 years later. (See Suetonius, Augustus, 65 and below, § 14, p. 442.)

In Arrogatio then we have what we moderns might naturally consider a private transaction alleged to be carried

⁴⁸ Ein Volkschluss für den einzelnen Fall abändernder das bestehende Recht. These words are actually applied by him, rightly or wrongly, to the testamentum comitiis calatis, Msr.³ iii. p. 320.

⁴⁹ See § 7, p. 269 and Msr. iii. p. 132. Otherwise the comitia curiata had, at least originally, no concern in the matter. An attempt was made, but apparently not carried out, to effect the traductio of Clodius to the Plebs by a plebiscitum, Cicero, ad Att. 1. 18. 4. This could scarcely have been necessary, as the gens Fonteia was evidently of a respectable antiquity, having held a Praetorship in 169 (Livy, 43. 11). Note that the populus universus spoken of in Cicero's letter could not have been the comitia centuriata as Seeley suggests, Livy, 1.º p. 64. Diocletian, Cod. J. 8. 47. 2.

out by a regular statutory measure of the only body as yet competent for legislation. The meetings of the same body specified above as calata (p. 366) were also used, we are told, for purposes which are in themselves, at least primâ facie, of a similarly private character to arrogatio, but in which an act of legislation is not alleged (see above, p. 374). The subject accordingly belongs rather to a consideration of the functions of the Pontificate than of the comitia curiata, and the treatment of the testamentum comitis calatis will be placed in § 14, after the brief note there on arrogatio. But it should not be forgotten that the same question arises here, as in the case of lex curiata (above, pp. 367, 372), and that there is considerable divergence of opinion as to the attitude of the comitia in the old testamentum, which many high modern authorities persist in regarding as truly legislative 50.

In this matter, as in others connected with the word lex, a certain confusion of thought and theory appears to me to arise from a misapprehension of the fundamental and primary idea expressed by that word, which is, as I have endeavoured to shew elsewhere, public declaration rather than binding law. The latter meaning and qualities it acquires, no doubt, very early, from the assent or acceptance of the assembly before which the declaration is made. This explanation suits perfectly well with the various early uses of the word whether in traditional practice or in old document: e.g. the lex curiata of Regal times, and the lex which must be assumed as a derivative source of the legare occurring in the Twelve Tables. As to the former, see above, p. 36751. As to the latter, the words uti legassit have not only been considered by the Roman lawyers themselves as giving an extended or

⁵⁰ Msr. 3 iii. p. 307, n. 2 ad finem (see also above, n. 48).

⁵¹ Mommsen's explanation of the old *lex curiata* is, as it seems to me, perfectly consistent with the Twelve Tables being emphatically *the lex publica*, as the first put to and accepted by the *populus* in a recognised legislative character. See Jurisprudence, i. pp. 309, 321.

new power to testators⁵², but have been interpreted by moderns as proving a statutory character in the early testamentum generally. In point of fact the words referred to are limited to directions given as to the custody of the testator's property generally and the disposal of a certain part of it: but these directions are most probably only the lex or qualifying declaration of a fiduciary mancipation⁵⁸.

Other semi-legislative acts of the Comitia. Other action of a quasi-public character is suggested by Mommsen to have been taken by the curiae, and possibly by their formally carrying a resolution to the particular effect as a political body⁵⁴. Such are the express allowance of gentilias to a body of Plebeians consolidated into what practically amounted to a gens⁵⁵; the reinstation, in personal gentile right, of a public exile⁵⁶. The former case is apparently rather matter of Pontifical function: in the latter the intervention of a lex curiata is alleged, but not on very intelligible grounds, as entering into an appointment itself improbable and legendary⁵⁷.

Alleged electoral, judicial and legislative functions. In the vague and general statements which are to be found in the earlier books of Livy and Dionysius—mainly the latter—we find three functions specially assigned by Romulus to the curiate assembly, regarded as a populus or $\delta \hat{\eta} \mu o_{S}$: all, be it observed, subject to a subsequent approval by the Senate:—the decision on peace or war, the election

⁵² See Pomponius, Dig. 50. 16. 120. Verbis legis duodecim tabularum uti legassit, &c., latissima potestas tributa videtur, &c.

⁵⁸ On the well-known clauses quoted in Gneist, Bruns, &c. as vi. 1 and v. 3 I shall of course speak more at length elsewhere.

⁵⁴ They are here assumed by him to comprise the whole *populus*. See above, p. 364.

⁵⁵ Msr. 3 iii. p. 75.

⁵⁶ ib. p. 42, n. 1; cf. Livy, 5. 32, 46.

⁵⁷ Lex curiata lata est, dietatorque absens dictus (Camillus), see Msr. iii. p. 41, n. 1 and Livy, 5. 46.

of officials, and the ratification (ἐπικυροῦν) of laws⁵⁸. To these must be added a judicial part allowed to the people—i.e. in the reputed reign of Tullus, the comitia curiata—on appeal from capital sentence⁵⁹.

The first of these three former functions—the decision on peace or war-is further stated to be only competent to the people when the King shall choose to submit the question to their decision. This particular function therefore may be postponed till the general discussion of the kingly power. As to electoral functions, the possibility of such, in the case of the alleged subordinate officers, the duumviri perduellionis and the quaestores parricidii, come best under the consideration of the Regiae leges (see however below, p. 380): the appointment of a tribunus and a pontifex is treated under those heads (§§ 12--14): so that the only occasions for the exercise of electoral functions which fall to be considered here are the traditional elections of the Kings themselves; a subject which has been partially anticipated in the Appendix to § 8, on Interregna. For the etymological inferences to be drawn from the word tribunus and its Gothic parallel, see the Appendix to § 12.

First of all, in Dionysius' account of the constitutional functions apportioned by Romulus, we must notice the alleged general power of veto, enjoyed by the Senate, upon all measures passed by the popular assembly: there is a foundation of reality in this, from his obvious reference to the Publikan law of 339 B.c. as nullifying this veto to a certain extent by enacting that in the case of all leges which should be

⁵⁶ Dionysius, 2. 14. In Livy the founder's performances are almost exclusively military: the constitution, mainly matter of religious observance, is attributed to the priest Numa, Livy, 1. 15, 19, 21. On occasion, we of course get details of interest from Cieero, de legibus, de republica, &c. But, in general he is a mere echo of popular tradition, as Blackstone might be said sometimes to be of Hume, if Blackstone had read Hume, which does not clearly appear.

⁵⁰ Livy, 1. 26: Dionysius, 3. 22, and generally E. R. L. §§ 11—17.

brought before the comitia centuriata the patres must accept or reject them before the voting in that assembly 60. But the question belongs properly to the Publilian reform.

In the legendary accounts of the Royal elections, there is to be observed a certain uniformity and a general reference both to the *inauguratio* and to the *lex curiata* mixed up with the most improbable constitutional theories.

The gratuitous subdivision of itself by the Senate into decades (p. 303), and the transparent device of retaining royal power in its hands by the clumsy machinery of an interregnum, would, I think, be discarded at once by modern criticism, but for the undoubted survivals of the usage in historical times (see § 8, App.). The one thing credible in our accounts is the intolerable character of a government represented as exceeded only in this respect by that of the second Decemvirs 61, and certainly not likely to end in the mutual amenities and deferences between Senate and People of which Dionysius gives so naive an account. The strange thing is that this most incredible part of the story is repeated twice over by Dionysius 61 a and perhaps endorsed by Cicero 62. It does not appear to come from the usual Valerian source of Livy, but from some other pious chronicler of the early days of the Republic, and the old time before them, and may be taken as evidence of the real power residing in the royal or pre-royal Senate, which is temporarily attributed to the popular assembly.

To pass in more detail to the pre-Tarquinian reigns, which I venture to regard as representing alternate Roman and Sabine ascendancy. In Dionysius' account of Numa, Tullus and Ancus, as well as in that of Tarquinius Priscus 62a,

⁶⁰ Compare Dionysius, 2. 14 with Livy, 8. 12.

⁶¹ Dionysius, 2. 57; see 10. 59 and Livy, 3. 36.

⁶¹a Dionysius, 2. 57; 3. 36; 4. 40.

⁶² De republica, 2. 12. 23: Nonius, s.v. Modicum, p. 342.

⁶²a Dionysius, 2. 58; 3. 1, 46.

there is an election by the people, following a nomination by the Senatorial interrex or Senate, and confirmed by favourable auspices. Servius is irregularly placed on the throne and accepted by a contio: nothing is said, either in his case or that of the usurper Superbus, of the auspices 63. Livy's account though less diffuse than that of Dionysius, agrees with it in the main. The auspices are mentioned only in the case of Numa. He, as well as Tullus, Ancus and apparently Tarquinius Priscus is King by popular election and sanction of the Fathers, i.e. the Senate 63a: Servius without mandate of the people and by the bare acquiescence of the Senate⁶⁴: Tarquinius, the usurper, without either⁶⁵. In his book de republica Cicero represents Numa, Tullus, Ancus and Tarquinius Priscus after a regular, and Servius after an irregular, election by the People, proposing and carrying a lex respecting their own magisterial powers at the Curiate assembly of the same People 66.

In the later times of the Republic, we are told by the same author, the so-called assembly summoned for passing this lex curiata was merely kept up for the sake of the auspices, and was purely formal, not being attended by the people, but by thirty lictors who represented them 66a: originally, he says, this was really a second meeting of the same people as had elected the officers in question, meant to give an opportunity of revoking their previous favour. Such a second meeting for this strange object is surely very improbable, but there is nothing improbable in one such

⁶³ id. 4. 8, 10, 38, 40.

esa Livy, 1. 18, 22, 32, 35. In the first case the people (plebs) pass a resolution (scitum) in blank accepting any nominee of the Senate (1. 17).

⁶⁴ ib. 41, 46, 49. So Seeley (Livy's, p. 170) translates voluntate in the first of the above passages, comparing Cicero, de rep. 2. 21. 38.

⁶⁵ In Dionysius, 4. 38 he calls a packed meeting of the Senate, before the murder of his father-in-law.

⁶⁶ Cicero. de rep. 2. 13. 25; 17. 31; 18. 33; 20. 35; 21. 37, 38.

⁶⁶a Cicero, de leg. agr. 2. 11. 27; 12. 31: see generally Msr. i. p 611.

meeting, always connected with the auspices, but subsequent to and confirmatory, or otherwise, of a nomination previously made elsewhere. The so-called lex curiata de imperio has been sufficiently dwelt on above (p. 371). At present I will sum up my own conclusion as to the general electoral power attributed by Dionysius and others to the curiate assembly as obscurely indicated in the traditions of regal appointment. The conclusion at which I myself have arrived, as to the part really played by the people in these elections, if they ever existed as such, is that it was virtually nil. At the outside it may have amounted to a vague popular declaration of fealty to a chief already appointed, most probably by the Senate.

As to the appointment of any other officers during the Regal period we have nothing to go upon but the clearly apocryphal story of the trial of Horatius. I must not anticipate the subject of perduellio or parricidium (see Regiae leges), but I may say a few words here upon the possible suggestion of popular election in the case of the duumviri perduellionis or the quaestores parricidii, both of which offices are evidently extremely old. For the former, this antiquity is proved by the very ancient form of their name 67 and of the formula quoted by Livy, the metrical quality of which points to a time when writing was at least unfamiliar, as its contents also seem to place it before the regular establishment of provocatio 67a. I do not, of course, set equal store on the narrative in which this relic of primeval practice is enshrined; but, as to the only point with which we are at present concerned, I must point out that, however a representation of the two original tribes may be surmised, there is not a tittle of evidence for election by them. The appointment is, according to Livy, solely by the King; whose

⁴⁷ Corssen⁴, i. p. 268, ***.

Livy, 1. 26. See generally, below, the articles on Regiae leges.

selection, in fact, of the particular charge upon which the accused, Horatius, is put on his trial, is voluntary and very arbitrary: on parricidium he must have been condemned.

There may, as was suggested by Zumpt⁶⁸, be some argument possible for election of the *duumviri*, as representing the two old tribal elements, *under permission of the King*: but this is to assume the existence already of that fully developed officer, at a doubtful and early time.

The same difficulty applies to the appointment of the old quaestores parricidii, an appointment which, as descending to the Consuls from the Kings, is directly attested by Tacitus 688, appealing to a lex curiata revived in the early republic. The subsequent history and functions of these officers is a difficult and complicated subject: as to their original existence and appointment, I see no reason to depart from the view of the lex curiata given above that it was a formal acceptance by the people of a nomination already made elsewhere; whether by Pontiff or Senate we know not: the nominators mentioned by Ulpian, or his authority Gracchanus, are Numa and Romulus. See generally E. R. L. § 17.

These very ancient officers had no doubt a real existence. On the other hand it seems waste of time to speculate as to the popular election or otherwise of the hypothetical tribunus or chief of an independent tribe (§ 12, p. 402), himself an inference, though a probable one. As to the officer of that name who is traditionally represented as a subordinate to the King, there is no question of election.

On the whole, the alleged electoral power of the *comitia* curiata may be passed by as either mere suggestions based on subsequent republican practice, or guesses at the probable procedure of a period preceding our earliest tradition.

⁶⁸ Zumpt, Criminalrecht, i. pp. 92, 93. Cf. generally, E. R. L. § 12.

⁶⁸a Tacitus, Ann. 11. 22: cf. Ulpian, Dig. 1. 13. 1. pr. quos (reges) non sua voce sed populi suffragio crearent.

Judicial powers. The existence of a regularly allowed appeal to the people, and their practical constitution, as a Court of first instance, for criminal justice, belong of course to the beginning of the Republic: but something of the kind must, apparently, from the formula preserved in the story of Horatius, be attributed to the Regal period. If it is to be dated, according to that story, before the Servian reform, the people intended must have been the comitia curiata, and the trial must have required a regular vote of that body. It is possible that the whole idea of trial before "the people" may have originally depended upon a primeval principle of sentence executed by the community generally upon those whose violation of Divine Law would involve a curse on that community if left unpunished 69. The alleged employment of provocatio, in the particular case of perduellio, belongs properly to the Tarquinian sovereignty with its cruel penal law, ending in the revolution, and the substitution of an obligatory right of provocatio for the permissive one which may have existed previously 69a.

Legislative. With regard to any general legislative functions of the comitia curiata, the particular character of the lex curiata specially so-called has been already considered, and the limited powers enjoyed by the assembly described, either in that act or in the one which endorsed the Pontiff's decision in arrogatio, see above, pp. 371—374. I do not deny the possibility of others even during the arbitrary régime of the true monarchy, which, as we have seen, is a very disturbing element. Not impossibly, if any reliance is to be placed on the stories coming at least from the close of that régime, its laws were more like true leges regiae, proclamations or ordinances, in which the main function of the people was to hear and assent.

⁶⁹ See § 13, p. 420.

⁶⁹a See Msr. 2 ii. p. 11, n. 3, below, p. 458, and generally, § 17, Regiae leges.

So far as particulars of enactment are reported to us, the initiative is represented as vested in the King: the function of the assembly being restricted to the ratification 70 of laws which he prepares and propounds, subject to approval by the Senate—a body of advisers chosen by himself and summoned at his pleasure 70a. I have hitherto rather quoted Dionysius as my main authority: but on this point there is a consensus of legal and historical tradition to much the same effect. Pomponius⁷¹ makes the King, in proper technical phrase, bring forward, and carry before an assembly of the people, leges curiatae—the term, in this case, having apparently a wider scope than that of merely conferring or confirming magisterial power; and Tacitus 72 while speaking of the occurrence of leges curiatae, for the latter purpose, eventually credits the King with unlimited legislative power, of which the first narrowing appears in the projects of Servius Tullius (see end of § 16). But this subject belongs more properly to the head of rex (§ 15).

Conclusion. The part ultimately left to the assembly, whether of curiae or centuriae, according to the views here adopted is not large. It is practically little but a veto, amounting perhaps at the outside to this, as in fact it is put by Mommsen—that the assent of the assembly was necessary to any change in the existing law?. I should add, any such change as could not be effected in the ordinary way of administration?. The condition of previous Senatorial approval, which is made by Dionysius a great point of distinction from the practice of his own time? though an important reality in the early republic, must have been in abeyance during at least the latest regal period.

⁷⁰ Ἐπικυροῦν, Dionysius, 2. 14 certainly assumes an initiative elsewhere, whether understood to be of King or Senate.

^{70a} See § 8, p. 290. ⁷¹ Dig. 1. 2. 2. 2.

⁷² Ann. 3. 26. Cf. Plutarch, Romulus, 22. έθηκε...νόμους τινάς κ.τ.λ.

⁷³ Hist. (Dickson, 1901), pp. 93 sqq.

⁷⁴ See § 16, pp. 536 sqq. ⁷⁵ See § 8, p. 297.

§ 11. ON THE DEVELOPEMENT OF SOVEREIGNTY GENERALLY

Original and secondary formations of a State, p. 384. Conception of a State and Sovereignty proper, 385. Sovereignty literal meaning of, 386; sole, ib. Austin and Maine's criticism, 387. Development of Sovereignty by union of functions, 388. Legislative power comparatively late, ib. Instances Anglo-Saxon and Roman, 389. Hebrew monarchy, 391. Early administration of justice, 393. Judge singular or plural, 394. Priority of Assembly and Senate to Monarchy, 395. Greek ἀγορά and βουλή, ib. Date of Hesiod compared with Homer, 396. Their different points of view, 397. Lateness of Sovereignty proper in general, ib. Early histories of old States, 398. Corssen's Primeval King, 399. Subject of following sections, Tribune, judge, βασιλεύς, gerefa, pontifex, 400.

Original and secondary formations of a State. The constitutional questions discussed in this and the following sections are, it must be remembered, merely those of a very early time. In the historical formation of new States before our own eyes, or those of our immediate forefathers, internal and external factors have obviously combined towards the ultimate result; but probably the most important of these is the antecedent history of the component elements. The tradition, inherited tendency, or political instinct of the English colonists in America determined their original formation into certain forms of political association far more than either the ordinary disputes which must necessarily arise among such colonists themselves or the pressure

of the Savages and the French power from without. The same principle applies of course to other matters besides the formation of Sovereignty. The secondary components of a modern State come together already possessing their settled rules of conduct, or law, upon most matters of importance in social intercourse. The evidence, then, of these later instances has not the independent value possessed by cases of the original formation of States.

Conception of a State and Sovereignty proper. speaking of the developement of Sovereignty at Rome. I must be understood to speak of the developement of Sovereignty proper, as in a State, and also to assume that Sovereignty in a State means more than the enjoyment of mere absolute power over a body of people. The existence, indeed, of such power, unless vested in an actual majority of the body, appears to me impossible, as a permanence, without some reference to principles which, however vague. meet with the approbation or acceptance of the body generally. I do not propose here to discuss the case of the Hebrew Patriarchs (see § 5, p. 160), or the origin of the ideas of Right and Wrong, which I believe to be the foundation of the whole Social Structure², being themselves derived from the Social Instinct of Man³. What I now assume is that the Sovereignty of any enduring State must include, amongst its essentials, some principle of the Administration of Justice, dependent on those ideas, and that it is mainly from the developement or organisation of that principle that the associations of mankind approximate more or less nearly to the idea of a State, and Sovereignty in a State, properly so called.

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¹ Crane and Moses, Politics, p. 126; Bluntschli, Theory of the State (tr. 1901), pp. 266, 277.

² See Hesiod, Theog. 901, on $\theta \epsilon \mu s$ as the source of Good Custom, Judgement and Peace. Also P. J. pp. 42, 43.

⁸ Jurisprudence, i. p. 98.

Sovereignty taken in its bare literal sense is a supreme power residing in a minority of the members of a human association. It is a mere accident that it has been found, as a matter of historical fact, at one time or another, in most old States, concentrated in one person. This is often apparently the case where, from circumstances of migration into countries previously occupied, the state of the human association under our notice has been, at an early period of its existence, one of War, the requirements of which are, indeed, throughout considered by some to constitute the immediate genesis of Sovereignty proper, at any time4. But such sole leadership will generally prove on examination to be only an inchoate or partial Sovereignty (see § 12); and even where the particular authority in question has gathered into itself the other functions which combine to make up the general or complex power of Sovereignty proper, the combination in an individual has not always been very stable or permanent. (I am not, I must remark, speaking here of the kind of permanence which Bentham and Austin require as a condition for the existence of a State at all: their reasoning, on that point, appearing to me unsatisfactory, as depending on a very superficial reductio ad absurdum⁵.)

Sole Sovereignty, then, even when attained, has not been historically by any means a permanent institution but has sometimes had to give way to the plural, but minor, authorities which preceded it, revived under slightly different forms; sometimes, though nominally retained, had to share its powers with other officials in such a manner as to reduce it to a government nominally "limited" but constituting in fact a "Corporate" Sovereignty. The history of Rome, after the fall of the Tarquinian dynasty, is, I believe, an

⁴ Jurisprudence, i. p. 164.

⁵ ib. p. 150.

example of the first case. On the other hand, in the Teutonic settlers in Britain, as in some Continental associations of the same and kindred stocks, an originally sole military leadership has been developed into something more nearly resembling true Sovereignty, perhaps by the proximity and example of the Roman Empire, while the popular assembly, or rather its Council, retains considerable part of the powers once belonging to it. The later phenomenon is still more observable in the early history of Iceland^{5a}.

Austin. That the Sovereign, whether sole or corporate, in a State, is the only source of law properly so called, is the well-known position of Austin: law being, according to him, merely the command of the person or persons vested with the supreme power expressed by that name, over their subjects in the particular State concerned.

A modern and crucial instance of the inadequacy of this definition of law, as dependent on bare power, was given by Maine, in the case of Runjeet Singh, as an absolute despot, competent to issue any amount of arbitrary command, but who never would or could have dreamt of changing the civil (quasi-religious) rules under which his subjects lived6. It is possible that much the same might be said of a tribal leader, such as Romulus is hereafter depicted (§ 12), of the chieftains of the Iliad, or the Saxon invaders of Britain: all of whom I conceive to have had their rules of family relation, their canons of blood-feud, in fact their θέμιστες generally, existing prior to their marauding expeditions, though as yet in a vague and undefined form. toriality does not seem essential to the existence of such rude nascent elements of law. But the further developement of anything resembling either a legal system, or a State properly so called, I believe to be normally subsequent

⁵a Bluntschli, Theory of the State (tr. 1901), p. 263.

⁶ Maine, E. H. p. 382.

to some definite *local* settlement, some more or less loosely compacted principle of union, and some comparatively regular administration of justice.

Of all this we find traces in the elements of early Rome, the principle of union being community of religion, the "laws" backed by religious sanctions, and the administration of justice conducted under the control of a common priesthood?

Developement of Sovereignty by union of functions. In the present and the following four sections I propose to treat of the developement of that general power called Sovereignty with which Austin starts, and which rather constitutes, to my mind, the crowning stone of a State properly so called, by the union of functions. And I have elsewhere used the term the *final rex* or King, with the express intent of distinguishing that officer from the occasional or temporary tribal leader, who may be considered as personified at Rome by the fabled Romulus; although most of the characteristics of a true or complete sovereign are, in a well-known passage, attributed to him by the constitution-mongering Dionysius. (See above, § 10, pp. 376—380.)

Legislative power comparatively late. In that centralisation of different powers included in the modern idea of Sovereignty, the most important, according to general opinion, of the functions referred to—the Legislative—is, in all probability one of the latest. The Jus Quiritium for instance, judged by its internal character, would appear to date its origin from a time when the Presidency over those among whom it obtained must have been simply that of a Priest or Priests: nor is the replacement of such pre-existing rules, by the imposition of others, either very conceivable or borne out by actual tradition.

⁷ See sections 5, 9 and 14 on *gens, curia* and *pontifex*. Also § 17 on the Royal Laws generally.

The Judge and the law may follow the Chief, but certainly come before the King: the Lawgiver comes last of all. In some nations accordingly, like that above referred to (p. 387), real, conscious legislation, or the laying down of new rules of conduct, as distinguished from and modifying previous Custom, seems never to have been reached at all, the subject body or bodies being left to carry out existing rules, backed, no doubt, by the common understanding that the governing power will interfere to support their execution if necessary. In such cases the law is tacitly recognised by the Sovereign: it can only be said to be imposed by him through the juridical fiction that what the Sovereign permits he also commands.

Instances Anglo-Saxon and Roman. The views here expressed are not merely hypothetical, or based upon some isolated survival. The greater part of the present section is, in fact, an attempt to eke out the somewhat scanty evidence which we have for the position maintained in the case of Rome, by distinct indications of a similar process in other races mostly of the same Indo-European group, but, in one remarkable case, of an entirely different stock.

Under our own Anglo-Saxon princes, a previous time of judgement-books—not volumes of reports, but tables of model judgements, which we might almost call, from their predominant subject of wergild, scheduled tariffs of homicide—may be confidently inferred from the earliest specimens of avowed legislation⁸.

A parallel, at least of form, may be found in the so-called Royal Laws of Rome, which although they may come down from a historical monarchic period, the Tarquinian, belong actually not so much to the class of enactments as to that of judicial memoranda. And the same is probably true of the

⁸ P. J. p. 92. See Thorpe and Schmid.

Greek $\theta \dot{\epsilon} \mu \iota \sigma \tau \epsilon s$, of which, however, unlike the Roman Regiae leges, we have no definitely reputed fragments remaining 8a.

Traditions of primeval legislation may appear somewhat strange evidence to adduce for a pre-legislative period. Yet the fabulous and extravagant stories told of the authors of such legislation point surely in that direction. Where the legislature is (pace Pais) a historical fact, it will generally be found that the work is really a codification of matter previously familiar.

Express statements as to the origin of national law, or part of a nation's law, in custom, while they support the thesis which I am now maintaining, bear rather generally upon the origin of all law: but the tradition, or the historical fact, of the assent of the whole people being essential to legislation, under a Sovereign, may be taken more particularly as some evidence of a prelegislative era of Custom, nominally retained even after a true Sovereignty has been established. Such traditions do come down to us with regard both to the Monarchy at Rome, and the early monarchic or aristocratic governments in great part of Greece¹⁰. The case of Athens, after the changes introduced by Cleisthenes, must I think be considered a new departure rather than a survival: the change from the earlier state of things being indicated by Bluntschli's description of it as (placing the βουλή) "more and more under the influence of the masses11."

In the Continental States, akin to our own, of the Frankish race, a consent of the whole people to any new law was, at least formally, required some time after the establishment of a very powerful Monarchy¹²; as in England we find the

⁸a See P. J. p. 38.
Bluntschli, Theory. &c. (tr. 1901), p. 505.

¹⁰ Bluntschli, 6. 9. p. 367; 6. 20. p. 460.

¹¹ Compare Bluntschli, l.c. p. 460 with p. 462: and see P. J. p. 160. The change is more fully described above, § 9, App. pp. 340—342.

¹² Baluze, Capitularia, i. p. 394, cap. tert. anni 803, § 19 (the words are quoted in Bluntschli, p. 377, n. 5).

popular assembly still surviving, for the same purpose, after the establishment of an organised legislative body, although gradually narrowed to a semi-legislative semiconsultative council of great men¹³.

I have cited instances from nations of our own stock in support of my thesis, that the power of original legislation, which is certainly one of the chief characteristics of Sovereignty proper, is only gradually acquired.

For the development of such Sovereignty, as a whole, the best instance that occurs to me is another record, coming from a non-European breed. It is surely not impossible that, in spite of differences of religion and race, some of the same internal and external exigencies may have been the operative cause in any human association developed into a Polity or State proper.

Hebrew Monarchy. In the earlier period of Hebrew history the supernatural or metaphorical enters too largely for it to be read literally by the side of that which follows. But in what seems, on the whole, a fairly historical part of the national record—the books of Judges and Samuel—we have a continuous account of what possibly forms a rough type of the early course of events in some of our own Aryan States.

In this case we begin, when the curtain rises, with a loose association of tribes, the members of each being recognised as related, the tribe bearing the name of an individual progenitor, and these again being reputed as descending from an alleged common ancestor.

These tribes are connected, in a slight and vague way, partly through a common religion, partly through a somewhat intermittent administration of justice, and an occasional military leadership by individuals of eminence. They pass,

¹³ Stubbs, C. H.⁶ i. pp. 143, 213, 300. The development of the King's judicial power, after the Conquest, is another matter, for which see P. and M. i. pp. 17, 18.

however, successively under the more permanent and general influence of a priestly judge of special sanctity, next of a warrior king (who is, after one unsuccessful experiment, a persona gratissima with the officers of religion), and finally of a hereditary royal dynasty.

This case is no doubt complicated by the direct intervention of what is called Theocracy: but even that has an important bearing, not only on the origin of Sovereignty, but of Law in general. Here, as in many nascent States, the apprehended anger of Heaven plays a great part in ensuring conformity to the rules or declarations pronounced by an originally half-sacerdotal, half-judicial authority. But I have pointed out elsewhere¹⁴ the necessity for a supplemental sanction of human disapproval, on the part of the association to which the individuals specially concerned belong. There are plenty of instances of this in the early Hebrew history. Whatever the popular belief or theory of a supernatural support to the primitive rules of conduct observed; in practice, the maxim "Deorum injuriae Dis curae" would have been a cynical anachronism, nor indeed could such rules have had the actual working existence necessary to bring them within the province of Jurisprudence at all15 without the supplements above referred to. I do not postulate, for this purpose, a regularly centralised civil authority, which, as in the interesting instance cited from India by Maine 16 generally indicates a later stage. The priestly judge, who appears in the earliest period, often lacks, so far as we can see, both any regular appointment and any expressly recognised authority. But he has behind him the general feeling of some elementary association of human beings, which causes the rule on which he bases his decision to be practically obeyed. And it is the deference to this

¹⁴ Jurisprudence, i. p. 90; P. J. pp. 130, 155, 156.

¹⁵ Jurisprudence, i. p. 69.
¹⁶ E. L. and C. pp. 39 sqq.

feeling, whether accompanied by religious belief or not, which I regard as the *efficient* motive for obedience to the earliest rules which can be designated as nascent Law.

Early administration of justice. A large proportion of this matter is obviously connected with an early Criminal cognizance of Crimes as Sins, requiring atonement in the interest of the community¹⁷, exposed, by the act of its erring member, to the anger of Heaven. It is in such fragments of the Regiae leges, coupled with legendary stories—particularly these centring round the name of Numa—that we find what slight indications there are, in Roman story, of the Priestly Judge preceding the King, an order of things more clearly evidenced in the Jewish History, and possibly in the Greek.

Of the anger of Heaven incurred, the averting of that anger through the medium of a human judgement, and the carrying out of that judgement by a people at large or individual private members of the people I hope to shew direct evidence in the so-called Laws attributed to the early kings of Rome. In some other cases the existence of Religion as a factor in early Law, would seem to be totally absent from the state of things of which we first catch sight. But it is obvious that the early declaration of Wrong or Penalty, whatever the pretension of the declaring body, sole or corporate, to Priestly or Prophetic character, must have been in accordance with those feelings of the Society at large which I have elsewhere described as Positive Morality¹⁸, to render them effective.

In all cases this primeval administration of Justice seems to occur in connexion with an assembly of the body, before which we find some influential person or persons declaring what is right or fitting 19 for the case. The presence

¹⁷ See App. to § 9, p. 348, n. 144, &c. ¹⁸ Jurisprudence, i. p. 102.

¹⁹ Jus, see ib. i. p. 299. Cf. too the antithesis, to any idea of an administration of justice, in the rude condition of the Cyclopes, Hom. Od. 9. 112. τοῦσιν δ΄ οῦτ΄ ἀγοραὶ βουληφόροι οῦτε θέμιστες.

of the common people (δημος or λαοί) in the early "Courts," if we may call them so, to which I have referred, may be at first sight considered a mere matter of publicity aimed at by the Judge. But the repeated use of the special word for assembly (ἀγορά, gathering, from ἀγείρω), associated with the plural elders, or the one Headman, in the declaration (δίκη) of justice, points to such declaration as being, if not the sentence of a people, the shewing, with their assent, of what seems most right, or in accordance with the principles of Divine justice (θέμιστες) to them. It is, no doubt, a far cry from the "sacred circle" (see below, p. 424) of Homeric judgement to the Saxon County Court. But, in spite of the perplexing variety of grounds alleged for "Suit of Court," in the interesting passage of Maitland on this subject²⁰, I cannot avoid seeing something of the same motive for the old Greek and the old English usage. A little more must be said elsewhere on the Homeric trial-scene²¹; to which however I must premise a few remarks of a more general character.

Judge singular or plural. The single judge predominates in the references made above to the Hebrew Scriptures: but there are obvious indications, in the Psalms and in the book of Job, of a plurality of such functionaries having also existed in the early Semitic associations. Possibly this plurality may be the older form of nascent Sovereignty or pre-Sovereignty. We find undoubted traces of it in Aryan races; and such an order of development is of interest to us, as agreeing with the general theory of coalition, from which one would rather expect a plural representation of the coalescent elements in a common administrative body.

The argument, which will be attempted below, based upon the history of the word βασιλεύς does however raise,

²⁰ P. and M. i. pp. 522—537.

²¹ Below, pp. 424, 426.

and partly depend upon, two questions: the antiquity of the Senate, which evidently bears some relation to the plurality of judges; and the comparative priority of the Hesiodic and Homeric poems.

Priority of Assembly and Senate to Monarchy. The popular assembly, and the Senate, at Rome, are represented to us as institutions of Romulus: but, as we have seen, that name indicates an absolutely prehistoric period. The important Pontificate is apparently referred to the second king; and this king obviously represents the first beginning of anything like a civil and religious organisation, while his name is connected with the oldest family law and the most primeval penal sanctions. Moreover the fact that the Senate almost directly after the removal of the tyranny attained a power equal if not superior to that of the single Sovereign, is some argument for a prior and temporarily depressed (see § 8, p. 297) authority of that body.

Treated more generally, the comparative priority of both the general assembly and Senate with regard to the establishment of a true Sovereignty is a matter of question. It is answered in the negative by Corssen, whose theory of an original King, in the Indo-European race at large, is given below (p. 399) and further examined in the Appendix to § 15. As will be seen, I venture to differ from him, and on grounds independent of the foreign analogies here cited, to which moreover an instance of some interest may be added from Teutonic antiquity²².

Greek ἀγορά and βουλή. As regards the particular race, whose style for "King" I have shortly (§ 13, App.) to consider with reference to the origin of Sovereignty, although the "assistance" of the people is emphasised above, and will

²² The judicial administration of the Hundred was, according to one of our highest historical authorities, probably older than Royalty in England, possibly older than the same institution among the Salian Franks. Stubbs, C. H. ⁶ i. pp. 58, 98, 104.

be more fully noted hereafter, there is no special inference to be drawn from the *names* of the popular assembly or Senate: the one merely indicates that the meeting is expressly brought or called together: the other that the act of the Council or councillor is one of personal will or volition²³.

Date of Hesiod compared with Homer. Upon the second question above indicated, the comparative antiquity of the Homeric and Hesiodic poems—particularly the most interesting of the latter—the Works and Days—and therefore of the traditional sentiment and feeling which they respectively embody, opinion is much divided. Modern criticism tends I think to place Hesiod much the later. The following rather different view was suggested by the interesting prefatory remarks of the late Mr Paley, in his edition of that author.

In the Homeric poems, particularly the Iliad, the dominant note is of war and foreign enterprise, so that the chief or leader very much overshadows the normal system of settled life (if any). But, even as thus overshadowed, the popular assembly and the Council shew distinct traces of co-existence with the martial leader, which are not inconsistent with both institutions being really prior to or co-eval with him. In fact the bare coalition of independent families, beyond the limits of the kin (maegth) or gens, and the village community or tun, would seem to constitute a state of things in which the mere settlement of disputes would necessitate the application of some common rules of conduct amounting to law. Equally urgent will be the penal treatment of acts committed by some individual member which are likely to be prejudicial to the association as a whole. Of both classes of jurisdiction we find clear traces in various early associations of human beings, prior to anything approaching that general

²⁸ See Curtius⁵, p. 174 (§ 125 b) for ἀγορά and p. 549 (§ 659) for βουλή: also generally above § 8, p. 280, and § 10, p. 356.

concentration of authority called Sovereignty, though they are rarely found, at least in a developed form, in the smaller or intermediate groups (see § 5, p. 154; § 9, p. 329), being usually merged on the coalition of these into larger associations. The general crystallising or coalescing influence in early Rome, it is here endeavoured to be shewn, was Religion; but this was by no means necessarily or invariably the case in the formation of a State.

Different points of view of Homer and Hesiod. Whatever be the real date of Hesiod, I believe some of the poems, which pass under his name, to describe an older and more fundamental state of things than the Homeric Monarchy, or chieftainship²⁴. The Works and Days semes in point of view, to bear the same relation to the main part of the Iliad and Odyssey as Piers Plowman to Chaucer²⁵. In the latter we find the genial and picturesque life of the wealthy and powerful: in the former, the toil and hardship of the people, with the deep-lying structure of earlier times preserved in their homely ways and everyday institutions. The difference of the two is rather in point of view than in date or priority of subject matter.

Paley, indeed, following Colonel Mure, considers this difference due to the varying temperament of the race described—the Ionic or Pelasgo-Greek, and the European or Hellenic²⁶—but I do not think this suggestion is necessary, or very easy to make out. I would rather leave it that they are two phases of the same society.

Lateness of Sovereignty proper. I am here, however, trenching on the subject of a sort of "society" to be inferred prior even to the Homeric chieftain²⁷; whereas

²⁴ Apparently a "state of things" (scarcely an approximation to a State or Political Society) recognised in some sort by Thucydides (1. 3), prior to the chieftain "Hellen the son of Deucalion."

²⁵ Probably Tusser would be a better comparison than Langland.

²⁶ Paley, Hesiod, p. xii. ²⁷ See above, p. 386.

I am at present simply concerned with his priority, and that of the Priest Judge, or Senate Judges, to that general and permanent power called Sovereignty, which constitutes the coping-stone of a State, and which I take to have been only attained, at Rome, in the Tarquinian dynasty.

The ultimate, or immediate, foundation of that power was probably there, as elsewhere, mainly due to external needs, such as War, which generally requires that the power of the association should be concentrated in one person²⁸. But there are internal evidences which lead me to the conclusion that the Pontifical power, which was per se religious, and only consequently judicial, preceded, and was developed into, the Monarchy. It must be remembered that, as a general proposition Sovereignty is not necessarily sole, and that it is rather in the concentration of functions than of persons, that we have to trace its proper origin²⁹.

Early histories of old States. The view here adopted as to the genesis of a State, and Sovereignty proper, runs, it must be admitted, somewhat counter to most ancient traditional literature. But, as to this source of information, we must remember of what the so-called early history of ancient States really consists. The legends, which furnish his material to the writer of such "history," are mostly, as we see in the case of Rome, composed of the exploits of individuals, whether originating in native ballad, foreign (Greek) romance, or venal heraldry^{29a}.

Dealing primarily with national heroes, or the supposed ancestry of noble patrons, they will generally give a positively misleading impression as to the homely beginnings of a State.

²⁸ See Salmond, Jurisprudence⁵, p. 94. This appears to be the case with the first king of the Hebrews: possibly with the heads of the so-called Heptarchy in England.

^{*} These will be treated in detail, under the heads of tribunus, pontifex and rex in § 12-15.

²⁹a See Sources, pp. 30, 40.

Such legends belong to a time when Royalty or permanent Chieftainship, at least comparatively great accumulation of wealth and power in few hands, has been already established. This must at first sight blind us to the possible existence of a previous condition, which can on enquiry be, in many cases, definitely predicated with a considerable degree of certainty. The general impression for instance given by the Homeric and the early English poetry would be that Monarchy was a primeval institution with the Hellenic and Teutonic races.

Corssen's Primeval King. This is the view accepted by Corssen, who, in an interesting passage of his main etymological work, deduces from the derivation of the word rex, and similar words in languages of the old-Indian, the Hellenic, the Graeco-Italian, and the Teutonic races this conclusion:—that the institution of Royalty—a law-administering, however, not a despotic, Royalty—is in these races primeval, or at least was in existence before their separation³⁰.

I much doubt if this conclusion can be very securely established even on etymological grounds: it is certainly contrary to some results of archaeological investigation. It does not appear to be accepted by Jhering, either as to his general mother-nation of Aryans, or in his particular view of the Teutonic and Roman stocks³¹; and most of the traditions, upon which Corssen relies, appear to me to be sufficiently accounted for by the existence of Chieftains or temporary leaders, such as are contemplated in the next section, where the different old names for Headman, as distinguished from Rex, are discussed. For rex itself, and the more particular discussion of Corssen's theory, see § 15 and the Appendix to § 15.

Corssen², i. pp. 451, 452. See my § 12, pp. 402, 403, and App. to § 15.
 Compare, however, his Evolution, &c. (tr. Drucker), pp. 25 and 326.

400 § 11. THE DEVELOPEMENT OF SOVEREIGNITY

Subject of the three or four following sections. I pass in the following sections to a more particular consideration of the Roman elements of Sovereignty which I consider to be fused in the ultimate rex, together with a brief resumé of the reputed functions of that officer and a short note or Appendix on Corssen's original King. To the section treating on the first of the elements referred to, tribunus, is added an Appendix of other Indo-European names for Chief or Leader, which appear to me to approximate more or less nearly to the Roman name and idea. Among these the introduction of the Greek βασιλεύς has been already explained (above, p. 394); but I feel that I ought to apologise for the insertion of the much debated Anglo-Saxon reeve or gerefa, as the suggested origin of this name and office depends upon a questionable theory of my own. The same apology applies also to an addition to the section on the Roman pontifex of some remarks upon an office and name of equally disputed origin, the Frankish scabinus or échemin.

Pontifex. I must apologise for the space devoted to the subject of pontifex as well as for a certain amount of repetition on the functions of this office which largely overlap those of the comitia curiata. On the meaning of the name, as I have the misfortune to differ toto caelo from the explanation usually adopted, I am obliged to speak at some length in defence of what I feel is a very slenderly supported suggestion.

§ 12. TRIBUNUS

Comparatively late development of sovereignty at Rome, p. 401. Tribunus, pontifex, rex, ib. Connexion with the three old tribal elements, 402. Tribunus generally; tributum and triburer, ib. Tribunate of the plebs, 404. Romulus' tribuni and the tribunus celerum, ib. Tribuni militum and tribunal, 405. Conclusion, 406. Corssen's primeval king, ib. Appendix. Early names of people and headman, 407.

comparatively late development of Sovereignty at Rome. The original constitution, or pre-constitutional condition, of Rome was probably a loose kind of federation, which might be called an aristocratic democracy. The sole Sovereignty, which undoubtedly preceded the Republic, was, according to the view here adopted (§ 11, p. 398) a comparatively late development, compounded of earlier offices which did not amount to Sovereignty proper. These inchoate Headships I propose to identify with the names of tribunus and pontifex: the ultimate development with that of rex.

It is probably in the semi-coherent stage of a military association connected with the first of these names that a tribe or fole gives itself or receives from its neighbours the specific names considered above (§ 6, App. p. 254). Members of such tribes, arriving in England apparently together, were

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¹ Aristocratic, in so far as those family associations, which had reached the fuller development of the paternal system, held themselves superior to those which had not, even before the distinct separation of a certain ring of families: democratic, in the evident equality of these families as between themselves (see § 7).

subsequently scattered through the country which they acquired, and the process of coalition began anew. With the subsequent formation of the English petty kingdoms, their association into one, and its final conquest by the Normans, I have little to do, as they do not suggest very definite Roman parallels. The growth of English law and its subsistence, to great extent, under a powerful autocratic magistracy, are interesting subjects of general Jurisprudence but, in themselves, rather peculiarly national phaenomena.

Connexion with the three old tribal elements. I do not propose to assort these approximations to Sovereignty definitely between the three racial elements indicated in § 6; but they certainly do appear to be, in the above order—tribunus, pontifex, rex—more particularly connected respectively with the three tribes, Ramnes, Tities and Luceres². The separate consideration of the functions attributed to the tribes designated as above may throw considerable light upon the final rex of the Roman populus, in the Tarquinian Royalty, and upon the succeeding republican offices, into which that dignity was resolved. I shall therefore proceed first to consider, in more detail, the first dignitary of the three, a subject already partially treated in the section on the Romulian tribes.

Tribunus generally, tributum and tribuere. Tribunus, as has been intimated above (§ 6, pp. 231,245), must on etymological analogy, have originally meant the Officer, probably the Headman or Chief, of a tribus. I have dealt elsewhere (App. p. 408) with the conclusion which has been drawn from the particular connexion of this name, and others, with that of the tribe or people; but may here anticipate the conclusion at which I myself have arrived

² See Muirhead, § 1, with which this view is generally in agreement. On Jhering's tabulation and my reason for differing from it see § 6, p. 234.

from a consideration of the various facts historically connected with the name and office at Rome, which is to this effect: that the name in question represents in its natural and original usage the military element, and the military element only (see however, p. 412) in that joint product which we call the Sovereignty of a State. For the more advanced constituents of what we may properly regard as a perfect State or political organisation³ at Rome, we must look elsewhere. We rather find them, according to my view, in the curiae or grouping of curiae and their sacerdotal presidents the pontifices⁴.

The somewhat heterogeneous character of the functions, &c. associated with the word tribunus, and others connected with tribus, in historical times, is a decided difficulty. This seems to me to arise partly from that extraordinary and anarchical institution the tribunate of the plebs, partly from the employment of the word, and political division, tribus in the Servian constitution under an entirely different signification from its original meaning in the so-called Romulian triad. It is to this latter cause that I attribute the word tributum, the tax payable tributim⁵, and tribuere (above, § 6, p. 245) which in my opinion can only refer to the later local tribes, though Mommsen, on the evidence of Dionysius⁶, as I venture to think erroneously, sees a connexion with the old γενικαί rather than the τοπικαί φυλαί.

³ See Jurisprudence, i. p. 161.

⁴ See below, §§ 13, 14, also Mommsen, Tribus, p. 19. For a comparison with the Village Community, above § 2, pp. 22, 23; § 8, p. 295; § 9, p. 329, App. p. 354, &c.

⁵ Varro, L. L. 5, 181.

⁶ Msr.³ iii. p. 109, n. 2. The passage of Dionysius is 4. 14. The quasi-Etymologie, as Mommsen calls it, of Livy, 1. 43 proves nothing one way or the other. The word tribuere, to my mind, points rather to a distribution of burdens among tribes (plural) than to any assignment of territory among the members of a tribe (singular).

As to the tribunate of the Plebs, I will not anticipate my special section on that subject further than to say that, as soon as that body is recognised, or begins to recognise itself, as a distinct militant organisation, the old general idea of a Chieftain inferred as above (p. 403) becomes obviously appropriate for its champions or leaders.

Romulus' tribuni and tribunus celerum. Dionysius represents original tribuni as placed, by the universal founder, over the three old tribes as leaders, hyeuoves. The word is evidently military, though connected with an encomium upon Romulus' organisation generally, for its self-sufficiency both in peace and in war. The same word is used of the head of his body-guard, whom Livy and Dionysius, in the account of his institution, treat as under the command of Romulus himself; but, at the end of the Royal period, spring upon us as an independent commander, tribunus, a magistracy held, as it happened (forte), by the serviceable Brutus at that particular time7. It is unnecessary to go into the tissue of inconsistent stories connected with this name, or into the probable confusion of this tribunate of the celeres with the ίππέων ήγεμονία held by the founder of the Tarquinian family under Ancus8. The "magistracy" of Brutus looks like being

⁷ Dionysius, 2. 7, 13; 4. 71: Livy, 1. 15, 59. See Pomponius, Dig. 1. 2. 2. 3, as to the *lex tribunicia* by which the Tarquins are expelled. In Cicero, de rep. 2. 25. 46, Brutus is specially designated as *privatus*. See Msr. i. p. 194, n. 1.

⁸ Dionysius, 3. 41; 4. 6. The commonplace derivation of celeres from "a man of that name," promoted to this charge for killing Remus (Servius, ad Aen. 11. 603 and Festus, P. p. 55, Celeres), which Dionysius attributes to Valerius Antias, does not in itself conclusively indicate to what arm this guard belonged: but their second name (Pliny, H. N. 33. 2. 9) flexuntes or flexumines, which has the ring of a genuine antique, may be taken to back Festus' statement (l.c.) of their identity with the later equites. A third synonym trossuli preserved in the same passage of Pliny, and referred, after the old fashion, to the capture of "a town of that name," must be traced to a "joy-ride" of the nurselings of Troy (see on Ascanius passim in the Aeneid) probably reproduced in the decursio of the imperial period. See however the Scholium on Persius, 1. 81 and Jahn's note. (Persius, pp. 100, 267.)

devised impromptu to give him a constitutional right of calling the People together; and the lex tribunicia of Pomponius (n. 7) is a mere anachronistic anticipation of late republican practice. The impression, however, conveyed, on the whole, by this part of the story, as well as by other scattered notices, is that we may regard the tribunus celerum, of the regal period, as not merely an ordinary military commander but, on occasion, a sort of alter ego to the King. This duality, which Mommsen somewhere compares with the position of Dictator and magister equitum9, is, to my mind, one of the many indications pointing to an original coalition of two tribes, having possibly two originally independent tribuni. I must however admit that, in all our traditions of the Regal period, the tribunus celerum appears merely as the King's lieutenant, and Mommsen himself, adhering to traditional Romulian triplicity, holds that Brutus is but one of three 10. In any case the office is obviously conceived as one of military leading, which is confirmed by the tribuni militum used in the Republic to defer the concession of the Consulate proper to the Plebeians, and by the quite latterday Colonelship of a legion which Horace was unlucky enough to hold at Philippi 11. The word tribunal, too, although used in a more general sense afterwards, was no doubt originally the Chieftain's seat of judgement12.

⁹ Msr.³ ii. p. 178, n. 3, and, if considered any additional authority, Lydus, de Magg. 1, 37.

¹⁰ Msr. ii. p. 177. See, for Mommsen's general belief, iii. pp. 95—97.

¹¹ Odd. 2. 7. 10.

¹² Dionysius (8. 45) calls it τὸ στρατηγικὸν βῆμα, in a passage where, as it is said of Coriolanus in the famous scene with his mother, στρατηγικὸν must be taken in its direct and original sense. In the connexion of tribunal with the Praetor, we must remember that this office once belonged to the two Headmen of the Republic, as Leaders. The objection of Mommsen, Msr. ii. 96, n. 2, as to the raising of soldiers merely refers to late republican practice.

Conclusion. I am of opinion, therefore, as above stated (p. 404) that the tribunate, however it may have been reproduced or continued in other forms, was in its origin merely a military chieftaincy, possibly temporary and only approximating in a comparatively slight degree to true Sovereignty. The independent chief of an originally independent tribe is, it is true, purely an inference (§ 10, p. 381), though a very probable one.

The case is different with the office coming next under our notice, out of which I, with many others, believe the supreme authority to have been more particularly evolved. It is, moreover, deserving of our special notice, as that of the officers whom we must clearly connect with the custody as well as the administration of the earliest Roman law, to whose records, in fact, our Roman constitutional writers owed their most genuine relics of the primeval theory and practice of their country.

Of Corssen's primeval King I have spoken above (p. 399), but a few words on that subject will be added when I come to consider the Roman rex in particular.

A few old names for early rulers or headmen are sometimes adduced in support of Corssen's theory, and are added in the Appendix to the present section, as several of them bear a close resemblance to the etymological meaning, if not to the popular acceptance, of the word *tribunus*.

APPENDIX TO § 12

EARLY NAMES OF PEOPLE AND HEADMAN

Tribunus, thiudans, &c., p. 408. Heretoga, cyn-ing, bretwealda, 409.

Postpone βασιλεύs and other Greek names, ib. Gerefa, ib.

Original functions and derivation of name, 410. Tun, gerefa as exactor, reafian, ib. Not a mere bailiff, 411. Hundred and mallus, ib. A military leader: also judicial, 412. Bylaws, burh-gerefa, 413. Head of a troop, 414.

Some light is thrown on the subject of the development of Sovereignty by a comparison of the different old names which have been employed to designate a people, or union of tribes, and its headman. The former have been dealt with already in § 10, pp. 357, 358: the latter will come under the heads of tribunus, pontifex and rex for more detailed and particular consideration.

As to the generic name of a people, the meaning of multitude, &c., which appears rather to be established for that larger body, as distinguished from a tribe, may indicate merely this vague and general notion, but is possibly better accounted for by a definite contrast of the general national gathering (see § 10, p. 356) with the smaller Council of Elders, which is evidently a very early institution in any old nationality.

With regard to the first of the three heads above mentioned, I may briefly resume the general results of my enquiries into Roman tradition and practice connected with the name *tribune*, &c. as bearing upon the developement of Sovereignty (see above, § 6, and the present section). I am distinctly inclined to regard this word as merely indicating

one, and probably the earliest, constituent of the general power intended by Sovereignty, viz., that of chieftain or military leader.

Judge. More significant, however, for my present purpose, as indeed for any general enquiry into the origin of Law, State and Sovereignty is the different function or qualification of Judge. This, as I shall endeavour to shew, is at Rome, as in the important case above referred to (p. 393), derived from, and secondary to, that of Priest. But the direct passage of Judge into the function of King, finds its best illustration in a difficult word, from the cognate Greek stock, a word, I admit, of questionable derivation, but which has, from a comparison of undoubted meanings in Homer and Hesiod, a peculiar value for the question now under consideration. It is placed, for convenience, under the head of pontifex, though it belongs rather to the present appendix as lacking the special religious signification of the Roman word, and being probably, like tribunus and the suggested parallel of reeve more distinctly connected with early secular authorities whether of the Senate or of the assumed original Host.

Tribunus is, in strictness, only the man or officer of the tribus: that he is their Head or leader, is a matter of inference, though a probable one. The same remark applies to thiudans the Gothic name for King or Prince, indicating the like connexion with thiuda which appears to designate the larger body of a collected people (see § 10, p. 358; § 11, p. 395). A somewhat similar derivation of the word King from cyn-ing was formerly accepted, but is not now in favour. A fanciful argument as to the dependence of the officer upon the prior people or tribe has been drawn from

¹³ The explanation child of the kin, or race, appears to be favoured by Kemble², i. p. 152, but he ends by deriving the word directly from the adjective cyne-, generosus, which is the view of Schmid and Liebermann.

some of these words14 but not much reliance can be placed upon it. All, for instance, that we can prove, as to tribunus is its general military character 15. This character is expressed in the name heretoga (which is translated dux by Bede) said of the legendary Saxon chieftains, Hengist and Horsa, who begin the conquest of Britain 15a. Other invaders bear a name significant rather of age and the consequent authority as members of council¹⁶. Bretwealda, perhaps only said of Kings enjoying or affecting some general supremacy in England, is usually supposed to denote merely extended government16a. The difficult Greek word βασιλεύς belongs more properly to the following section of which it constitutes an appendix together with other Greek names for King or Prince. I venture to add in this place some remarks upon an Anglo-Saxon office, the origin of which I am myself inclined to refer to some primeval connexion with the old military subdivisions or constituents of the original invading host—at least when these units took the form of permanent settlers. But I must admit the hypothetical character of these supposed bodies, as of the similar supposed components of the first Roman tribe.

Gerefa. I have decided to place here some remarks upon the Anglo-Saxon Gerefa or Reeve, as an office the origin of which I am myself inclined to refer to some primeval connexion with the old military subdivisions or original units of the invading Host. I must admit that I have no direct ground for suggesting this connexion in our records of the office in question. I can only urge its evidently great antiquity, and the lack of any satisfactory explanation of

¹⁴ Freeman, N. C.3 i. pp. 77 sqq.

¹⁵ See § 11, p. 388.

¹⁵a A.-S. Chron. (Rolls Series), i. p. 21.

¹⁶ Ealdormen, ib. i. p. 24.

¹⁶a This is the view of Kemble, ii. p. 21, as against Palgrave. It is wrongly taken to mean ruler of Britain. See the words of the Chronicle as to the conquest of Anderida (i. p. 26), and on the "Wealas" generally.

its name, either in current etymology (see Kemble², ii. pp. 151—181) or in our oldest accounts of its functions. In practice, the office of Reeve remains an important part of the component elements in Anglo-Saxon England, it is true, like tribunus, in a subordinate position, but which may be, as in the Roman case, the metamorphosed form of an original captaincy or minor headship. The parallel to this, at Rome, does not seem to have been retained, except in the fanciful account, by Dionysius, of the so-called Romulian system¹⁷.

Original functions and derivation of name. The tun of the Anglo-Saxons, whether founded by the leader of one of the smaller divisions of the invading Host, or not, was certainly, in many if not most cases, inhabited by a plurality of persons bearing the same patronymic or quasi-patronymic name (§ 5, App. IV, p. 198). It might, still in comparatively early times,—let us say in process of transformation into a Manor 17a -become concentrated into a single homestead 18. It is, however, suggested that this is always a later condition, the original form being that of a more democratic independent association, having its own officer, or head, called gerefa. In actual historical experience, it is true that we find the tun subordinate, and the gerefa appointed by a superior, lord or king. In this case the word has its common and what Stubbs considers its fundamental meaning, generally of steward. More specifically, "the mere servant or executor of the law" is the meaning to which the word tends in later practice, which is expressed by the Latin translation exactor. This translation and the ideas connected with it was, no doubt, part of the inducement that led Spelman (p. 487)

¹⁷ See § 8, p. 287.
^{17a} See Vinogradoff, Manor, passim.

¹⁸ The combination of originally separate homes, into one lord's holding, may be indicated in the curious later word *bold-getalu* of Alfred, 37: see Thorpe's Ancient Laws of England, folio ed. p. 38, n. c and Schmid, Gesetze, p. 91.

to derive Reeve from naefan (Schmid reafian): which derivation, as well as the supposed connexion with the German graf, is now generally rejected. The history of the word Reeve is placed by Kluge under the latter word, but merely for convenience, for the true connexion with words expressive of count or number is very clearly made out on etymological grounds. This, of course, is not unsuitable to the idea of a subofficial "numbering off" his company, perhaps when the notion of family connexion began to give place to that of military subdivision. In any case, I think there is some ground for believing the original of gerefa to have been an officer not confined to the functions of a bailiff. but in some position of command, though possibly, even from the first, subordinate, as was the case with the later and quasi-historical tribunus of Livy, 1. 59 and the Frankish scabini whom we first know as appointees of Charlemagne (see § 14, p. 452).

So far for the tun or township. Further to trace here the history of the hundred or the wapentake, and to compare it with the mallus of the Franks, would serve no purpose in an enquiry into the first foundations of Sovereignty at Rome. There is nothing in the history of the latter resembling the manorial or the feudal system, under which the original assemblies of freemen in the northern nations generally disappeared, as their individual constituents approximated more to the Roman clients, while their presidents assumed a more independent authority, and finally rose from the occasional leader to the permanent King. All this again is submerged in the final triumph of the Norman invader, and the replacement of all other authority and administration by the King's power and the King's peace. It is only in the very earliest days of the previous invasions, that we can find true parallels to the formation and grouping of the original elements of the Roman State.

In my endeavour to establish some parallel between the gerefa as the descendant of a possible captain in the invading Teutonic Host, and the tribunus as military leader of the original Italian tribe, I feel that I may have unduly magnified powers of the former, which may have belonged to him rather as the delegate of Royalty than as independent military leader (see above, pp. 405, 406). Yet that a sort of judicial power was possessed in a parallel case, by the original Roman tribunus, seems to be proved by the word tribunal, though such power may have been confined to the decision on military offences.

In the supposed Anglo-Saxon parallel, the division or squad being clearly smaller than the *tribus*, is, to begin with, less likely to have furnished occasion for contentious proceedings, so that any such would probably be carried immediately to the higher tribunal of the hundred 19. Yet the denial of all judicial power to the head even of the smaller association or division of invading units seems to be going a little too far, in the face of such general words as those of Eadweard 20 and other expressions to a similar effect. The limits of the reeve's power no doubt varied according to his local range, of which Kemble gives five or six different cases at the end of Bk ii. ch. 5 with the final remark that they are all judges in courts of greater or less importance 20a. Stubbs is to much the same effect as Maitland with

¹⁹ See P. and M. i. p. 558. It must be remembered however, that Maitland, in this somewhat positive denial, is speaking primarily of the relation of the chief to the minor pledges, the borsholder in the borh, &c. The reeve in the vill comes in at the end of more obvious cases and indeed is rather based on the questionable Edw. Conf. 28 (see ib. p. 81) referred to as "legal legend."

²⁰ Eadweard, I Pr., 2. 2, see however 2. 8: Aethelstan, I Pr.. 2 Pr. and 2, 26, &c. As to the general powers of the reeve, however, I must confess that I find the article in Schmid very inconclusive, nor does the list of passages in Liebermann make it much clearer.

²⁰⁸ Kemble², ii. p. 181. The name and general function appear to remain the same.

regard to the smaller *gemots* or meetings, which are mainly my present subject²¹, but he proceeds in the same passage to speak of the *bylaws* of the northern townships, which were made by the inhabitants themselves, and presumably enforced by their own minor magistrate the reeve. Of this however I have no direct proof.

In the larger vill, the fortified burh, the burh-gerefa appears when we first catch sight of him²² to be an officer in every burh, together probably with the bishop and the ealdorman. Already, however, we have the oft-recurring complication of royal appointment, and it is difficult to say whether this officer is strictly a King's delegate or a representative of the people²³. To return to the wider powers credited to the Reeve of earlier times, this officer seems to have been conceived as having not only the warning or summoning of a district24, but the function of a judge, certainly as assessor, and, in the absence of the ealdorman or bishop, as president of the folc-mot; all this being quite apart from the act of execution from which he acquired in later times his special style of exactor. This translation is, indeed, of itself, sufficient to shew that the original functions of the reeve had early become unknown; for it indicates a distinctly narrowed view of what appears to have been his original province. Whether that original judicial power can be traced back, like the tribunal of the Romans, to a general tribal or divisional headship, is a question to be hypothetically answered rather by analogy of other national

²¹ See i. p. 90, particularly note 3, comparing the passage of Hallam, M. A. ii. p. 282 to which he refers; also Spelman, Glossarium, p. 78, *Bellagines*, and Palgrave, Commonwealth, i. p. 80. The general equation bylaw=township-law is given by P. and M. i. p. 615, n. 5.

²² Aethelstan, 1. 1 (Cod. D. Schmid, p. 126). In a very old use (Ine, 63) the *gerefa* is simply a private man's steward or dependent.

²³ Kemble², ii. p. 172. See generally Maitland's article on the Boroughs, Domesday Book and Beyond, pp. 172—219.

²⁴ Monung or Manung, Aethelstan, 6. 8. 2.

antiquities than by any possibility of direct proof. Kluge, in the article above referred to (p. 411) suggests, as probably the original meaning of gerefa "head of a troop" as allied to words or roots signifying number or count. And this is the nearest etymological explanation at which I could arrive, in correspondence with my old friend and adviser Prof. Skeat²⁵.

²⁵ Kemble, on the whole, connects the word with rufen, O.H.G. ruofan and the act of summoning, manung, ii. p. 154.

§ 13. DERIVATION OF THE NAME PONTIFF

Why taken first, p. 415. Old explanation Bridge-maker, ib. Jhering,
416. Leist, γεφυραῖοι, ib. Possible connexion with Tanagra, 417.
Rather with the return from Eleusis, ib. Pons sublicius, 418.
Donaldson and Rivier, 420. Scaevola and Plutarch, 421. Etymological possibility of Rivier's explanation, 422. Conclusion, ib. Appendix. βασιλεύς, etc. 423.

My practice has hitherto been to relegate questions of etymology generally to notes or an appendix. But, in the case of the particular Roman office now under consideration, the original meaning of its name, according to the interpretation here adopted, has so much to do with what appears to have been an original function of the office, that I have decided to treat the derivation of the disputed word pontifex as the subject of a substantive article to be taken first before a discussion of the actual functions themselves.

As far as etymology goes the word is one of the chief puzzles in Latin. The obvious explanation of Bridge-maker was long accepted with a contented unanimity somewhat surprising. One would think it should have excited some scepticism to find these priests of prehistoric antiquity, these depositaries of sacred and legal lore, named from an engineering operation which might not even have existed in the early infancy of an old nation. There is moreover the difficulty of Pontiffs occurring in other Italian communities, apparently as an original institution, where there was no river. To the last objection, however, the reply has been made that *pons* may be taken, on etymological grounds, to have originally had the general signification of way rather

than the special one of bridge¹. Thus Pictet² translates it, proprement voie, and compares with pontifex the Skt pathikit.

Jhering retains the literal idea of Bridge-maker, in connexion with the original migrations of the Aryan people. The religious functions, however, of the office, are only accounted for, as secondary, in a very unsatisfactory manner, by him³.

Leist. Nor can I accept, as throwing much light upon the subject, the reasoning of Leist, who, though he does not expressly vouch in evidence the *Argei* and *depontani* of Roman tradition⁴, does couple with some inconclusive reference from Festus⁵ what looks, at first sight, like a genuine Greek parallel, the case of the Attic $\Gamma\epsilon\phi\nu\rho\alpha\hat{\imath}o\iota$. To these I must devote a few words; for their connexion, as Bridgemen, with any religious ceremonial appears to me extremely doubtful⁶.

¹ Mommsen, Hist. (Dickson, 1901), i. p. 218, n. See Curtius⁵, p. 270, πάτος. Note in his connexion of this word with πέντος (as πένθος with πάθος) a Nasalirung which might partly explain the difficult -nt of pontifex (below, n. 39).

- ² Origines (1877), § 278 (ii. p. 377) pathikrt, celui qui prepare les voies, surnom du Dieu Agne. So Vaniček, p. 383, Pfadbereiter, der zum Pfade der Götter leitet. The metaphorical sense of this explanation is apparent, and Kuhn is quoted by Pianigiani (s.v. pontefice) as so taking it "perché fa o apre Paccesso agli Dei." A somewhat similar result of the derivation adopted below, pp. 421, 422 is reached however by quite a different way. Pianigiani himself prefers to take the first part of the word from the Oscan pomptis (five) as = quinquevir. But the office is surely older than the settlement of the number of the Pontifical Board. Fick has no pontifex: only for pons "Steg = Brücke." In Brugmann there is, as usual in cases of difficulty, allum silentium.
- ³ See Evolution of the Aryan (tr. Drucker), pp. 351—354. In pp. 356, 357 we have the whole story of the *depontani*, with the incredible and un-Roman disrespect for age charged on the Vestals (see § 9, p. 328 on *Argei*).

⁴ See Leist, Gr.-Ital. Rg. pp. 185, 186.

- ⁵ e.g. Paremne, F. p. 245: Petronia, F. p. 250. See however Msr.³ i. p. 97, n. 1.
- ⁶ Sehr dunkel, as O. Müller says of the sacra of Athens, which the Athenians are represented as performing on the Bridge of the Cephissus (Leist, l.c. n. 1).

These Gephyraei are mentioned by Herodotus as a family or yévos, from which the murderers of Hipparchus sprung?. They were, according to him, remotely of Oriental origin, but came immediately from a Boeotian residence into Attica, this part of the story being possibly due to a suggestion from the old title of TANAGRA as the Bridge-town over the Asopus8. Their name is probably that of a local Deme in Attica, so-called from the Bridge over which the mystic procession passed to Eleusis9. They retained, says Herodotus, a special worship, distinct from that of the other Athenians, in particular a temple and rites of an Achaean Demeter¹⁰. This epithet is used as a synonym for the goddess in Aristophanes (see Ach. 709). Of the various unsatisfactory explanations given of it in Etym. M. s.v. 'Axaià (p. 180), and by the Scholiast on the line in the Acharnians, I would only note, in the latter, the words ἀπὸ τοῦ ἤχου δν παρεῖχε τοῖς περὶ τὴν Γέφυραν εἰς 'Αθήνας ἀπιοῦσιν. They clearly refer to the banter and objurgations, on the return journey at Athens from the Eleusinian procession, which came to be known as Bridge-chaff, γεφυρισμός. For this, and no religious worship, is the special idea which appeals to the irreverent muse of Aristophanes, when he makes his chorus of Mystae invoke Demeter to aid their flouts and jeers 11. Such chartered license it was, which gave that mortal offence to Sulla, when delivered from the walls of Athens 12.

Herodotus, 5. 57—61. See the notes of Abicht, ii. pp. 51, 52 and Rawlinson, iii. p. 214. Also Thuc. 6. 54—58.

⁸ Etym. M. γέφυρα, p. 229. Strabo, 9 (586?400), referred to by Rawlinson (iii. p. 214, n. 6) as evidence for this connexion with Boeotia, has no notice, that I can find, of anything but the Attic γέφυρα.

Etym. M. γεφυρείs, p. 229.

This, I suppose, may account for the words in Leist (Gr.-Ital. Rg.), of the "Gephyraer" as "οι περι τὰ πάτρια lepά έξηγηται και ἀρχιερεϊ, wie die Pontifices." I cannot trace them to any classical authority, but suppose them to come from some Scholiastic note upon γεφυρισμός οι γεφυριστής.

¹¹ Ranse, 388, 392. The name, it is true, of Γέφυρα does not occur here.

¹² Suidas, s.v. γεφυρίζων: Plutarch, Sulla. 2, 13.

Originally, it was perhaps as much due to the crowding, in a narrow passage, as to any recollection of the buffooneries which distracted the brooding Demeter¹³. Anyhow, what connexion this Attic bridge had with religion, was due to the Eleusinian procession, not to the mere bridge-crossing, and is therefore no illustration of Leist's theory of the Roman pontifices.

Pons sublicius. It must, of course, be admitted that the Pontiffs were, whether from a false derivation or not, held by many Roman antiquarians to be so named from their immemorial connexion with the ancient bridge which formed the communication between Rome and the Gate-fortress (Janiculum) on the further side of the Tiber¹⁴—so-called, says Festus, because by it the Roman people originally passed into the Tuscan territory¹⁵. The road in fact, however, lay in the reverse direction for King Porsena, whose success is ill-disguised by the veil of Roman legend¹⁶.

It was, no doubt, by an old precaution for the security of the city that this bridge was always to be of wood, and so, easily destructible, to avoid the possibility of a sudden inroad¹⁷. Its scrupulous maintenance without any metal

¹⁴ In the long rambling note of Servius on Aen. 2. 166 which is partially quoted by Leist (Gr.-Ital. Rg. p. 185, n. 1) the derivation of pontifices from an image of Minerva placed in, and called after, the bridge γεφυριστής (sic), is followed up with that preferred by Varro, 5. 83, and probably by Servius himself.

¹⁵ Festus, P. p. 104. Janiculum dictum quod per eum Romanus populus primitus transierit in agrum Etruscum, as it is held. For this probable force of the subjunctive with quod see Roby's Grammar quoted, § 14, p. 440.

¹⁶ Livy, 2. 10, 12, 14, 51 and § 6, p. 241.

¹⁷ Varro, 5. 83: Festus, F. p. 293. Sublicium...Sallustius libro quarto

fastening is insisted upon by Dionysius, the necessary repair, from time to time, being entrusted to the Pontiffs who discharge this duty with due religious ceremony; only, however, as a part of their general functions, from which it is true they get their Roman name, being instituted as chief priests by Numa long before¹⁸. Varro has the same explanation which he prefers to that of the lawyer Pontiff Scaevola (see below, n. 22), referring at the same time to the ceremonial with which the repairs were accompanied on both sides of the stream¹⁹.

When Varro and Dionysius wrote Etruscan and Roman had long become politically one, and what had been a military precaution had become a religious observance. We might perhaps compare the few "particular customs" surviving to Hale's time in the town of Berwick-on-Tweed²⁰. All this is quite naturally accounted for, without any special religion as to crossing rivers: the pontiffs' function of looking after this particular time-honoured bridge was evidently a historical fact, however it may have arisen from a mistaken derivation of their name, and the ceremonial connected with it has plenty of modern parallels. The "making," supposed to be expressed in the latter part of

historiarum ne inrumpendi p(otestas sit), &c. An emendation which I prefer to Müller's p(ontis sublici), &c.

¹⁸ See Dionysius, 3. 45 on the foundation of the Janiculum and the bridge, both of which he attributes to Ancus: hence the Pontifis came to be popularly called pontifices, being properly styled Hierophants, id. 2. 73. Pliny, H. N. (36. 15) puts this as a military precaution in more express terms: sine ferree clavo...ut eximantur trabes sine fulturis (i.e. leaving the supports) et reponantur quod item Romae in ponte sublicio religiosum est, posteaquam Coclite Horatio defendente aegre revolsus est. The bridge is said to have been washed away in an inundation of the Tiber, 69 A.D. (Tacitus, Hist. 1. 86) but had apparently been restored when Pliny presented his book to Titus 77 A.D.

¹⁹ See n. 22. I do not think there is any reference to the practice as to the Argei, which Müller suggests.

²⁰ See Hale, Hist. Comm. Law (1820), p. 257.

the word pontifex, is an obvious matter of popular etymology; not, however, as we see, universally accepted by Roman lawyers. Littré, in modern times, indeed suggests (s.v. Pontife) the more technical force of facere²¹ in connexion with the sacrifice on the bridge (in eo) mentioned by Varro l.c. &c.

But it is time to pass to the meaning of this word which I believe to be the true original one, and to be however obscurely indicated in the derivation of Scaevola²²; with which latter Plutarch²³ agrees, rejecting the current explanation from the custody of the pons sublicius as $\gamma \epsilon \lambda \dot{\omega} \mu \epsilon \nu o \nu$, though he admits the great antiquity of this function, dating from the time of Marcius, many years before the bridge of stone was constructed (? by its side) in the censorship of Aemilius. This was done in 179 B.C.²⁴

Donaldson and Rivier. Among the few authors, who have ventured to question the old derivation, fewer still have suggested a new one. The most suggestive ones that I have come across are those of Donaldson and Rivier. The former gathers from the reasoning of Varro, in L. L. 5. 3, a meaning of pons, as signifying originally heavy weight (mass of stones), and regards the pontifex as the man who settles an atonement by the imposition of a fine, i.e. a certain weight of copper²⁵. This strange meaning of pons cannot

²¹ Like the Greek ρέξειν. See inter alia Virgil. Ecl. 3. 77. Cum faciam vitula pro frugibus.

²² Varro, 5. 83. Pontifices, ut Scaevola Quintus Pontifiex Maximus dicebat, a posse et facere, ut potifices: ego a ponte arbitror; nam ab his sublicius est factus primum, et restitutus saepe, quom in eo sacra et uls et cis Tiberim non mediocri ritu fiant.

²³ Numa, 9.

²⁴ Livy, 40. 51. Only the piers were laid at this time, the bridge being completed by Africanus and Mummius, 142 B.C. The founder was really the other censor Fulvius; for the preference given to the name of Aemilius see Burn, p. 263. Another reason might be that he was pontifex maximus and so concerned with the old bridge.

²⁵ Varronianus³, p. 496.

be accepted, but the function of the pontifex as atoner is a conclusion worth notice. For amongst the earliest records that we have of Priesthood generally we find distinct reference to a removal of the anger of offended Heaven either from the offender himself, by his expiation, or from the community, upon which he has brought a curse, by his devotion²⁶.

Rivier translates the name *Pontifes* directly, without explanation, as *Purificateurs*²⁷. The exercise of this function as we shall see, in the consideration of the *Regiae leges*, is probably the beginning of Roman Criminal Law, and also is clearly indicated in the arrangement for composition of the vengeance allowable on the part of man, which is the foundation of the law of delict. For its connexion with the earliest civil procedure generally see the remarks on *sacramentum*, § 14, p. 451. For the present I am only concerned with the etymological possibility of Rivier's explanation.

Scaevola, Plutarch and so far as I can make anything out of his reasoning in L. L. 5. 3, Varro, recognise the possibility of the *n* not being necessarily part of the original word pontifex. But, Scaevola's attribution of sacrificial power generally, scarcely seems sufficiently specific. Now there is an old word putus²⁸, synonymous with purus, and from the same root pu- (reinigen), which, if we can suppose it arrested at one stage of the vokal-steigerung noted by Corssen²⁹, would give us at once the form suggested by Scaevola and

²⁶ See § 9, App. p. 348; § 14, p. 450.

²⁷ Rivier, Introd. Hist. p. 117.

²⁸ Varro, L. L. 6. 63: Festus, P. p. 216, Putus.

²⁹ U; au; ou; eu; ō, ū, Corssen², i. 370. I cannot derive pontifex or pōtifex directly from putus, which appears from pūtare, &c. and the scrap of a line of Ennius quoted in Festus, F. p. 217, Putum, to have the first u short: but must assume some higher gradation (steigerung) of the u such as poutifex or pōtifex. The insertion of the ut is perhaps simply due to popular etymology. But for its scientific possibility see Corssen, Nachträge, p. 192.

the sense required by Rivier, which corresponds with so many known historical functions of the early Pontificate. The same root and the same signification are, I believe, to be recognised in the word poena, but, as the derivation of that word is disputed, I propose to postpone its consideration till we come to the enactment of the Twelve Tables in which the word first occurs.

With this, I must admit, somewhat unsatisfactory conclusion, I leave the attempt to infer the original office and object of the Pontificate from the possible etymological meaning of its name. That purification from guilt, or sin, was an early function, and an important one, of these priests can I think be proved. On the other hand their connexion with the pons sublicius is an undoubted fact which many will still think sufficient to account for the name: the views of Jhering and Leist I must presume to discard altogether.

Conclusion. I pass, therefore, from the styles, as I consider them, of military leader to what I hold to be the more proper and immediate element of Sovereignty—the function of Judges³⁰—which can, at least at Rome, be shewn to be a developement, both in civil and criminal cases, of the Priesthood. That subject belongs more properly to the functions of the Pontificate which I have placed in the next section after an Appendix on the Greek word $\beta a \sigma \iota \lambda \epsilon \dot{\nu} s$. In this last the priestly element, it is true, disappears, while that of Judge is distinctly prominent. This Appendix was previously added to the section of tribunus with other names of Headmen—a matter I admit rather of convenience than of logical connexion.

³⁰ Jurisprudence, i. p. 164.

APPENDIX TO § 13

Βασιλεύς, &c.

Reason for separate treatment of βασιλεύς, p. 423. Early uses of the word, ib. Hesiod and trial scene in Homer, ib. The plural judges, 424. The assistance of the people, 425. Pagus, mallus, &c., ib. The elders, 426. Speech of Achilles, ib. Aristotle, Basilidae, 427. Original meaning of βασιλεύς, ib.

I have ventured to take this word apart from the other Greek names signifying King or Ruler because of its peculiar and important significance as bearing upon the development of Sovereignty, whereas their meaning is general and comparatively inexpressive (see pp. 427, 428).

It is treated as an Appendix to the derivation of Pontiff, not as furnishing any parallel to the supposed developement of the Priest into the King, possibly through the intermediate character of Judge, but as springing directly, according to the view here adopted, from the latter character.

The precise original meaning of the word, as determined by its etymological derivation is a subject of great uncertainty and disagreement among philologers. We can only take its earliest usages and make the best of them. In the poem of Hesiod more particularly referred to above, § 11, p. 397, the $\beta a\sigma\iota\lambda\epsilon\hat{\imath}$ s are undoubtedly judges or arbitrators, who settle private cases and take gifts, i.e. bribes, greedily³¹. In Homer we find the word often meaning generally King or Prince—once only in the sense of a mere private $oi\kappao\delta\epsilon\sigma\pi\acute{o}\tau\eta$ s

 31 Hesiod, Op. et dies, 39, &c. and compare the word δωροφάγοι with Exodus 23. 8 and 1 Samuel 12. 3, &c.

or paterfamilias (II. 18. 588). In the famous trial scene on the shield of Achilles (ib. 497—507), which is specially to be compared with Hesiod, the actual word βασιλεύς does not occur. Here, however, we have Elders of the people (γέροντες) sitting on marble seats in a "sacred circle" for the investigation (ἐπ' ἴστορι) of a claim for wergild, the payment of which is denied. They are vested, in succession, with the individual parole, or right of speech, through delivery of a sceptre by the heralds or summoners³², upon which each rises and delivers his sentence on the case for one or the other party. The acceptance of the sentence which is thought most just, and the award of the Court Fee to the speaker, apparently depends on the verdict of the surrounding people.

I have referred thus in detail to what Professor Ridgeway calls a "well-worn" passage, because of its singularly graphic description of a primeval administration of justice, and because, coupled with Hesiod, it seems to furnish significant evidence of the particular transition from Judge to King. The subject-matter of the suit recalls at once our own Saxon earliest beginnings of Law. The plural judges are to be remarked, see above (§ 11, p. 394) and distinctly suggest a Senate. The sum deposited corresponds very clearly with what is called the "stake" in the old Roman sacramental procedure. But there is to my mind, no question that the two talents of gold, deposited no doubt by the litigants, have come to be the fee paid to the Court, or rather to the particular Elder whose verdict is accepted by popular acclamation³³.

³² See Curtius5, p. 556, on Κῆρυξ.

³³ See Ridgeway, pp. 8, 389. I only cannot agree with him in accepting Maine's view of the Roman sacramentum as a bet. Although in the Greek procedure it has become a Court Fee, it certainly was, in the earlier Roman use, an atonement for the false oath which had been taken by the losing party, see below, § 14, p. 451; § 20, p. 620.

Several other points besides this are worthy of more particular notice in this well-known scene.

The assistance of the people is clearly indicated here and in many analogous cases. The children of Israel coming up to Deborah for judgement, Judges 4. 4, may, of course, be interpreted simply of individual applicants; but the story of Moses and his father-in-law (Exodus 18. 13, 16) rather postulates a more general attendance. Not to go back, however, further than Indo-European tradition, the early judicial function attributed to the Roman populus, § 10, p. 377, points to the same fact which is expressly stated in the Homeric trial-scene.

So too with Teutonic archaeology. In the pagus of Tacitus' Germania, in the old courts of Iceland, in the mallus of the Franks, it is obvious that the assembled freemen were, if not the original judges, at least the assistants on, or backers of, the judge's approved decision. The same view has been taken of our later "suitors" in the Court Baron 34. Gradually they come to be represented rather than to be present personally, and gradually their presidents assume a permanent and the appearance at least of an independent authority: but there can be no doubt that the rule of conduct enforced by these early Courts, in their first condition, consisted of that which was held by the people as customary or right. Such rules were, in their general features, settled prior to and independently of kings and councils. Kings and councils shape (see § 13) or particularise them, and make additions to them in the form of doms or model judgements but they are recognised as pre-existing, whether the actual expression theode theaw people's custom, refers to such or to more local matters³⁵. But I am here digressing too much towards the fundamentals of Law generally.

³⁴ See Stubbs⁶, i. p. 117, n. 6.

³⁵ See Schmid, Gesetze², Rectitudines, 4, § 4 (p. 377).

The Elders. There can be no doubt about the meaning of Baoileis in Hesiod, though the alleged lowering of their character is certainly remarkable, as compared with the Homeric scene. Here, the Elders, who in style and description cannot but remind one of the Roman body from whom the Roman judex was first taken, hold a dignified and responsible function, marked by the taking of the sceptre, which, as involving an oath of just judgement, elsewhere characterises \$\beta a \sim \lambda \colon \lambda \colon in the epithet $\sigma \kappa \eta \pi \tau o \hat{\nu} \chi o \hat{\gamma}$ which is said of the plural $\beta a \sigma i \lambda \hat{\eta} \epsilon \hat{\gamma}$ of the Phaeacians, and also, in the plural, as a substantive, without βασιλη̂ες³⁶. There is some further evidence as to the particulars of judgement, as well as of the general developement of Judge into King, to be gathered from the fierce speech of Achilles in the assembly described at the outset of the Iliad, which he himself has summoned as an independent chief (Homer, Il. 1. 54). The sceptre, which he raises and hurls to the ground, is one, he says, which the Achaean judges (δικασπόλοι) carry, who guard the Heavensent principles of Right; "and by it I swear a mighty oath37." The connecting links between this passage and that quoted above from the 18th Book of the same Iliad may be supplied from Aristotle's description of the Heroic Monarchies which were enjoyed by consent of the governed but were by custom hereditary38. The oath, no doubt of true judgement, taken by the ordinary judge, was apparently indicated by the raising of the sceptre: this feature, in the Roman judex, rather implied than anywhere directly expressed, is made the main point of his description by Mommsen³⁹.

³⁶ Homer, Odyssey, 8. 41, 47. ³⁷ Homer, Il. 1. 234—239.

³⁸ Aristotle, Politics, 3. 14. 11. I venture to take πάτριαι in connexion with κατὰ νόμον in this sentence: but I agree that the words are capable of another interpretation from what follows in § 14. ἐπί τισι δ' ὡρισμένοις. As to the particulars referred to see § 12. ὁ δ' ὅρκος ἦν τοῦ σκήπτρου ἐπανάστασις.

³⁹ Msr. Index, s.v. Geschworne, not, as one would expect, judex.

Whether the Basilidae whom Aristotle elsewhere⁴⁰ commends as a well-conducted oligarchy in Erythrae, or those whom Suidas mentions as generally exercising government in Ephesus⁴¹ were a *gens* or a gild they may equally be vouched in support possibly of an original plurality of judges, certainly of the development of the function of judge into that of general ruler.

Original meaning of the word partheis. To return however to the question of the development of Sovereignty: can we find any illustration of the King's being derived from the Judge, in the original meaning of the name, which comes to be used so very widely and generally to indicate the former? There can be no doubt, as has been said, about the meaning of $\beta a \sigma i \lambda \epsilon i s$ in Hesiod, or about the function of the Elders in Homer. As to the actual word $\beta a \sigma i \lambda \epsilon i s$, however fanciful it may seem, I am inclined, in fault of a better, to accept Kuhn's derivation⁴² from the stepping or mounting on the stone (Steinbetreter, see above, pp. 423, 424) and to hold that the word meant strictly and originally a declarer of sentence or judge, as described by the circumstances of such declaration; the more general signification of King or Ruler being derived and secondary.

Other Greek words for ruler have neither a uniform nor a very significant meaning. Μέδουτες, a word so often

⁴⁰ Aristotle, Politics, 5. 6. 5 (Congreve). Eaton considers them a gens, comparing the Bacchiadae at Corinth, the Penthelidae at Mitylene and the Myletidae at Syracuse. Grote (1888), iii. p. 11, n. 1, only suggests a confusion between Erythrae and Ephesus. On the question whether these apparent patronymics indicate the descent of an office in a family, or the formation of an official gild, see § 5, p. 160, n. 84 and App. III. p. 192.

⁴¹ Suidas, s.v. Πυθαγόρας.

⁴² Curtius⁶ (p. 362) quotes this derivation, but prefers that of Herzog, leader of the people, from the root $\beta\alpha$ -, comparing Zeυξίλεως, &c. Vaniček agrees with Curtius, taking the function of the $\beta\alpha\sigma\iota\lambda\epsilon\iota$ to be gehen machen, fahren (i. p. 183). Neither Brugmann nor Fick attempts a derivation of the word.

coupled in Homer with ἡγήτορες (leaders) is also found, though less frequently, in the singular, and in a verbal construction, with the general signification of governor or guardian. But the proper and original meaning of the word appears to be Counsellor, so that it may be an argument rather for the ancient authority of a Senate, and may be compared with ealdorman (above, p. 413). "Aναξ also may mean the caretaker or guardian but this meaning, if established, is too general to be of much use in our present consideration⁴³. Κοίρανος appears merely to express power generally.

Tύραννος, too, a word originally of good or simply medial signification, indicated the enjoyment of domination generally, but with no specific meaning; the use of this word in a bad sense, being a matter of more developed politics, does not concern us here⁴⁴.

⁴³ This explanation is accepted by Vaniček (ii. p. 882) who aptly quotes Plutarch (Theseus, 33) on the style of the Διόσκουροι as "Ανακες, comparing the phrase ἀνακῶτ ἔχειν. This phrase is used with a genitive by Herodotus, 1. 24; 8. 109: in the latter passage in a good sense "to look after," in the former in the unfavourable one "to keep a sharp look out upon" (τῶν πορθμέων). Neither Curtius, Brugmann nor Fick has anything on the word. An old-fashioned derivation from ἀνά or ἀνώ is put out of court by an undoubted initial έ.

⁴¹ For the derivation of this word from the Skt root tar, Heer werden, bemeistern, see Fick³, i. p. 90: Vaniček, i. pp. 288, 289. The absurd suggestion of a connexion with the dairy of an original pastoral family (capo della casina) was scarcely worthy of mention by so good an authority as Pianigiani, s.v. tiranno.

§ 14. ACTUAL FUNCTIONS OF PONTIFFS

A. Primarily religious, p. 430. Chief priest of populus, ib. Mode of appointment, 431. Development of quasi-secular functions, 432. B. Public civil: Regulation of times and seasons, ib. Contiones, comitia and calatio, ib. Curia calabra and Calendar, 434. Legal procedure, 435. Priestly administration of justice, 436. C. Private civil: Inauguratio and lex curiata, 437. Calata comitia for other purposes, 438. Twice a year, ib. Q.R.C.F., 439. Republican lex curiata de imperio, 440. Auspiciorum causa, ib. Pontiffs in special connexion with family law, 441. Arrogatio, ib. Sacrorum detestatio, 444. Testamentum comitiis calatis, ib. Law, or attestation and guarantee, 445. Testamentum in procinctu, ib. Comitia calata centuriarum, 446. Soope of comitial testament, 447. Part played by people, 449. D. Sacral law, 450. E. Private wrongs, sacramentum, 451. Scabini, 452.

Pontiff. To apprehend correctly the origin and primary functions of the Pontificate involves a considerable amount of difficult and rather inconclusive etymology which I have therefore placed in a separate section and here assume the signification of the word given long ago by Donaldson—the Priest who settles the atonement for a specific offence (originally religious) by the imposition of a fine or penalty—and its translation by Rivier—on what based he does not state—purificateur. Leaving aside, therefore, the consideration of what the name is derived from, I propose in the substantive part of this and the following section to deal with the probable original and the actual historical functions of the

 $^{^{1}}$ Donaldson, Varronianus³, p. 496: Rivier, Introd. Hist. p. 117. See too \S 13, p. 421.

Pontiff per se, and afterwards to consider the Rex as developed from, associated with, and ultimately absorbing the office of Pontiff or Pontiffs proper. For even without assuming anything for certain with regard to the meaning of the Pontiff's name, we may satisfy ourselves as to the important and permanent function specially attributed to this office from the independent testimony of sufficient old authorities.

Heads of religion. The Pontiffs are consistently represented to us as the heads of the National Religion. As such they had control of times and seasons, of days proper and reserved for religious observances; conversely of those open for legal business. Their connexion with the administration of Justice will be more explicitly treated below (pp. 436, 451).

Here and elsewhere I rely less upon stray traditional accounts of the institution of the office than upon the universally accepted survival, to historic times, of powers and duties, which may fairly be inferred to have existed from the beginning. For the tendency of the Roman Polity, as far back as the beginning of the Republic, and possibly as far back as the establishment of a hereditary Monarchy, or a Monarchy at all, is clearly to transfer power from, not to confer power on, the sacerdotal element.

Chief Priest of the Populus as a whole. The Pontiff or Pontiffs being officers who had superintendence over the State's religious rites and observances, their superintendence extended to those of the curiae and gentes, in which the State was, as we have seen², concerned. But we do not find a Pontiff as an officer of an individual curia, like the curiones and inferior Flamens³, nor a fortiori of a gens. In the original number of three Pontiffs, for which there is some evidence in tradition, we have indications of

³ § 9, p. 309.

² § 5, pp. 142, 172; § 9, p. 309. See also below, pp. 442, 443.

a Pontiff for each of the old Tribes⁴. The subsequent development of the Board, in which the other Pontiffs were associated with the *rex*, will be more particularly considered when we come to the transition from Royalty to a Republic. But, in our earliest antiquarian records, the Pontiff appears as an officer of the entire *populus* and only deals with the smaller and probably earlier associations as parts of the *populus*.

Appointment. Of popular Election, as in most early Priesthoods, there is no trace whatever. For the assumed Pontiff, who preceded the Roman King, we may suppose, if we like, a pretended or believed divine mission. The office may, of course, have been conferred by some formal act of the assembled People: but it was more likely assumed, by its first holder, as the fittest, with the tacit consent of the remainder of the association 4a. The need and the motive for such assumption and assent would seem to be some public calamity or the avoidance of some grave danger, feud, or crime—and, the not uncommon tendency to a unification of religion.

An attempt is here made to trace, at Rome, a possible developement of the Pontiff into the Pontiff-King. But the traditional Pontiffs of the Regal period are appointed by the King⁵. Under the Republic all sacerdotal appointments are made, in the way of cooptation, by the priestly colleges themselves, or by the Chief Pontiff⁶, until an uncertain date in the third century B.C., when a curiously limited power of election was statutorily conferred upon a minority of the tribes constituting the comitia tributa⁷; into which question, however, it is not necessary to enter here.

⁴ Msr. 3 ii. p. 21, n. 5: cf. iii. pp. 110, 111.

^{4a} See Bluntschli, Theory of the State (tr. 1901), i. ch. vi.

⁵ Msr. ii. pp. 19, 24, n. 1. ⁶ ib. pp. 24, 25.

⁷ ib. pp. 27-30, on the quasi-comitia of the 17 tribes. The reason, for true or complete comitia populi not being allowed, is given in Cicero, de lege

The tenure of office was, as in most of the old Roman priesthoods, for life⁸, so that the meetings for inauguration (below, p. 437) were necessarily *special* occasions. That this however did not continue to be essential to *calata comitia*, see § 10, p. 367 and below, n. 31.

Development of quasi-secular functions. From this general presidency over religious affairs flowed, as a matter of course, the regulation and settlement of all ritual, on which the Pontiffs had, down even to the time of Dionysius⁹ a free hand. But to it may also be traced a connexion more important to us with:

- 1. The regulation of times and seasons for public business, including legal;
- The ceremonial admission to high office, primarily regarded as religious;
 - 3. The special superintendence of family law;
- The administration of justice in general, criminal or civil.

Contiones, comitia and calatio. In these cases the Pontiffs appear generally in connexion with meetings, contiones, or assemblies, comitia, of the people. The distinction between a contio and a comitium is important though not always easy to maintain accurately, from our early accounts of the prehistoric times on which we are speaking.

Contio, according to Festus, is simply a meeting called together by a Magistrate or public Priest through a herald, to receive a notice, hear a speech, or perhaps assent to a

agr. 2. 7. 17, 18. This strange deference paid, in a distinctly popular reform, to a religious tradition, is one of the most striking instances that I know of the hold of religion upon the Roman populace.

⁸ Msr. ii. p. 19.

⁹ Cf. an unfortunately mutilated passage, Dionysius, 2. 73. καὶ νομοθετοῦσιν όσα τῶν ἰερῶν ἄγραφα ὅντα καὶ ἀνέθιστα κρίνοντες ἃ ᾶν ἐπιτήδεια τυχχάνειν αὐτοῖς φανείη νόμων τε καὶ ἐθισμῶν κ.τ.λ. For the unsatisfactory emendation of this obvious lacuna or pleonasm, see Jacoby's ed. i. p. 260.

proposal^{9a}: comitium is an assembly of the people to be dealt with as an organised body, e.g. for the purpose of taking an actual vote¹⁰. But, as has been indicated, the terms are not always used with sufficient precision for us to say whether there may have been an actual vote, with alternative possibility of rejection, or a mere assent and approval, by silence or acclamation, to a result already settled and decided elsewhere (see above, p. 368).

Certain comitia are said to be calata, specially called 11 or summoned by an officer of the Pontiff's, styled calator 12. These were originally and properly assemblies of the curiae: on their extension to the Servian centuries, and its reason or motive, I have spoken elsewhere (§ 10, p. 369). The special meaning of their being calata appears to be the Pontifical presidence at any assembly so styled. Hence, according to Mommsen, calatus comes to mean much the same thing as Pontifical 13. His assertion that these assemblies were merely for purposes of attestation, whereas other comitia might be for legislation, is probable but not certain 13a.

I proceed, however, to consider more in detail the legendary and quasi-historical functions of the Pontiffs, with their

9a Festus, P. p. 38. This is the coetus populi assistentis of Verrius Flaccus, or his reporter, the "mad" Domitius spoken of in Gellius, 18. 7. 8; cf. id. 13. 16. 3. The contio of the alleged law of Numa on Compensation for involuntary homicide (see § 4, p. 111) would appear to be a meeting of this kind: but it must be remembered that this reading depends on an emendation. In spite of the analogy of the Homeric trial scene and its κῆρυξ, see § 13, App. p. 424, I should hesitate to consider this Roman contio a judicial assembly.

¹⁰ See Macrobius, 1. 16. 14 and Varro, L. L. 6. 29 on comitiales dies. The "division" is rather fancifully supposed by Mommsen to be indicated in the fact that the word is regularly used only in the plural, Msr.³ i. p. 191, n. 4.

¹¹ Not in the sense of nominata or appellata (Skeat) but in that of convocata or invocata, see below, p. 434, n. 19.

¹² Festus, P. p. 38, Calaiores. The passive signification by which he explains the word like the Spanish criado is, of course, absurd. A KALATOR is connected with the REX on the ancient cippus of the Forum.

¹⁸ nichts heisst als pontifical, Msr. ii. p. 38, n. 1.

¹³a See generally § 10, n. 19a.

actual survivals, which may be all traced to the general Pontifical presidency over the religion of Rome. Much of this matter has been anticipated in the account of the comitia curiata: in fact almost the whole, except the possible utilisation of the curiae for purely military purposes as to which there is considerable doubt (§ 10, p. 359).

To take the functions or usages mentioned above (p. 432) in order:

Curia Calabra. The Calendar, which is traditionally represented as matter of enactment by Romulus or Numa¹⁴, was no doubt primarily connected with the due celebration, at the proper time, of religious festivals¹⁵.

Of this connexion, dating from prehistoric times, we have an interesting evidence from our antiquarians, in their accounts of the Curia Calabra. This was a chapel or sacred precinct16 in the Capitol, to which the people were summoned (calabantur) by an officer, whom Macrobius 17 calls a pontifex minor (see § 15, p. 464), or perhaps by the rex sacrificulus himself¹⁸, on the appearance of the new moon, to receive notice of the times and seasons of the ensuing month. A very primeval worship of Juno is indicated in the ancient formula preserved by Varro, to be used on what is to us a tolerably regular event, but apparently requiring once a special observation for each particular occasion. "For five days" or "for seven days" "I call on thee, Juno Covella19." It was from this calatio, whether it indicated the summons or the invocation, that the first days of the months were called Calendae, a passive participle, probably agreeing with nonae,

¹⁴ Livy, 1. 19, 20: Plutarch, Numa, 18, 19: Macrobius, 1. 12. 5 sqq., see E. R. L. pp. 15, 16.

See Festus, P. p. 49, Curia, particularly Calabra Curia.
 Cf. § 9, p. 308 with Corssen, Beit. pp. 355, 440, 441.

¹⁷ Macrobius, Sat. 1. 15. 10. See below, § 15, p. 464.

¹⁸ Servius, ad Aen. 8. 654. See Msr. 3 ii. p. 40. n. 2.

¹⁹ Varro, L. L. 6. 27. dies te quinque calo, Juno Covella: septem dies te calo, Juno Covella.

as the declaration of the Nones settled the month's main subdivisions and duration, there being from the Nones to the Ides ("the division") eight days, and sixteen afterwards, to the end of the month²⁰. Covella is obviously the hollow Moon (κοίλη σελήνη, as compared with the $\pi\lambda\eta\theta$ οισα of Sappho): a variant rendering, which has considerable Ms. authority (Müller's Varro, p. 84), Novella, is worth notice, as perhaps affording a better explanation of the word Nonae than that preferred by Varro (L. L. 6. 28). Why the Moon is called by the Latins Juno Lucina is laboriously explained by the same author (ib. 5. 69) with reference to the period of gestation reckoned in the division of time marked by the planet. In these meetings at the Curia Calabra, when Rome was so small that the people could still be summoned from their lands to the city21, at their King's command, we seem to see the record of a primal elemental worship when the great Roman Goddess Juno was still recognised, not by the researches of antiquarians or the speculations of philosophers, but by the simple expressions of national religion, as the Queen of Night while Janus her brother was the Lord of Dav²². The meeting of course was a contio, not an organised comitium23.

Legal procedure. Whether the original objects of this ancient ceremonial included that of informing the people of the proper days for legal procedure or not, such information was certainly conveyed in the extremely old lists and formulae connected with the *dies fasti*, some of which, at least

²⁰ Macrobius, Satt. 1. 15. 7. I have adopted, in the text, the explanation of Idus which he prefers (ib. 17), and which is accepted by Müller. Macrobius' etymology is not very satisfactory, and he suggests several other explanations, ib. 14, 16, all however more or less impossible, or open to the fault called by grammarians θστερον πρότερον. See too, for similar silly fancies, Plutarch, Quaestt. Rom. 24.

²¹ In urbem ab agris ad regem conveniebat populus, Varro, L. L. 6. 28.

²² See E. R. L. p. 22, n. s and p. 62, n. e.

²³ Msr.³ ii. p. 40, n. 2.

in popular belief, dated from the traditional period of the earliest Royalty²⁴. The knowledge of these—long a source of influence if not of emolument—if really published in the Twelve Tables, was, after the destruction of the original tablets in the Gallic conflagration, suppressed by the Pontiffs²⁵, who might from that fact alone, have been inferred to be its original repositaries. Their custody remained, as we know, a privilege, and a grievance, till the publication of the Fasti by Cn. Flavius.

Here, then, we have, in the Pontiffs' surveillance of the Calendar, a point of transition from purely divine to secular business, and a connecter of that body, if not directly with law, at least with the list of law days²⁶.

Priestly administration of justice. The line of argument here followed, as to the probable developement of the Regal out of the Pontifical power at Rome, depends largely^{26a} upon an examination of what are called the Regiae leges, which, as an entire subject, are best treated just before the abolition of Royalty and the institution of a Republic; some of them, in fact, to anticipate a little, there is special ground for attributing to the final Tarquinian tyranny. But there are others which have no obvious connexion with any part either of the Tarquinian dynasty or the so-called Servian reform: we place them earlier, on the simple internal evidence of their archaic nature, rather than on account of any reputed author. They are often directly attributed to Numa, an authority as fabulous, doubtless, as Romulus himself, but to whom a specially religious or priestly character is so consistently attributed, that we are obliged to regard the

²⁴ Msr.³ ii. p. 39. ²⁵ Livy, 6. 1.

²⁶ Jhering⁵, i. p. 291, n. 194^b, and generally the following section iii. xviii^a.

^{26a} I should not however omit the remarkable parallel of the Druids, as observed by Caesar (B. G. 6. 13). Their powers are considered by Seebohm (T. C. pp. 119, 120) to have in a manner descended to the early Gallic Church.

tradition as of some significance, in spite of the somewhat disconcerting appropriation of this hero, in later times, by undoubtedly "arrived" plebeian families²⁷. An original Pontifical presidency over the administration of justice is more particularly to be inferred from the early *criminal* law of Rome, which however very probably reached its culminating point of severity, after the secular had absorbed the religious power, under the stern rule of the Etruscan Kings^{27a}. To this I shall return.

I have first to speak here very briefly of the ceremony of inauguratio, which is the religious side of proceedings already treated in § 10 under the head of lex curiata (pp. 366 sqq.). The point however there under consideration was the attitude or function of the popular assembly: the present aspect of the proceedings is the fact of their taking place under Pontifical presidency.

Inauguratio is the ceremonial admission to the highest religious offices, which therefore would naturally fall under the surveillance of the heads of the State religion²⁸. It took place, for a Rex or Flamen^{28a}, as we are told by Labeo cited in Gellius²⁹, at calata comitia, which were assemblies, sometimes of the curiae, sometimes of the centuriae, the former summoned (calata i.e. convocata) by a curiate lictor, the latter

²⁷ See Livy, 1. 18, 19: Dionysius, 2. 57—70, &c., &c. Of the gentes which claimed him as an ancestor, the *Pomponia* is always admitted to have been plebeian, furnishing champions of that order from after the secession provoked by the *Decemviri* (Livy, 3. 54). As to the *Marcia*, see § 5, App. I. p. 183.

²⁷a Above, § 6, p. 242. See E. R. L. p. 64.

²⁸ Msr. ii. p. 35. On the veto always possible through proved de caelo servatio, see below, n. 46.

²⁸a No doubt the flamines majores. See Festus, F. p. 151, s.v.

³⁹ Gellius, 15. 27. 1, 2. In libro Laelii Felicis ad Q. Mucium primo scriptum est Labeonem scribere calata comitia esse quae pro conlegio pontificum habentur aut regis aut flaminum inaugurandorum causa. eorum autem alia esse curiata, alia centuriata. curiata per lictorem curiatum calari, id est convocari, centuriata per cornicinem.

by a cornicen (bugler); both being held under the presidence of the college of Pontiffs.

The part played by the people in this ceremony, and the true character of the *lex curiata*, have been already considered (§ 10, pp. 368, 369) together with the opinion of Mommsen as to the shifting of the venue to the *Campus Martius* in at least one case (ib. p. 367). Another reason is suggested hereafter (p. 446).

The rex intended by Labeo is of course the rex sacrorum of the Republic, but there can be little doubt that the ceremonial descended from the pre-republican times of the actual King. The rex was throughout a religious officer and the greater Flamens continued to the end to be patrician members of the old gentes.

Calata comitia for other purposes. As the offices specified were for life, the vacancies must have been occasional and the summons ad hoc. The change in the meaning of calata noted in a former section (§ 10, n. 19a) is accounted for as follows:

"At the same calata comitia," Gellius proceeds³⁰, "were wont also to take place the sacrorum detestatio and testamenta, for there were, as we have understood, three kinds of will, one at calata comitia in a meeting of the people, another in battle armature, when the men were being called into line for battle, a third by way of conveyance of the family^{30a}, in which last the copper and balance are employed."

Twice a year. It cannot be meant that the rare occasions for the inauguration of a King or a Flamen alone were utilised for what was or soon became a very ordinary business,

³⁰ Isdem comitiis quae calata appellari diximus et sacrorum detestatio et testamenta fieri solebant. Tria enim genera testamentorum fuisse accepimus: unum quod calatis comitiis in populi contione fieret, alterum in procinctu, cum viri ad praelium faciendum in aciem vocabantur, tertium per familiae emancipationem, cui aes et libra adhiberetur.

³⁰a See § 3, p. 54.

but that the same class of assembly was used, possibly in a less solemn form (contione), for that purpose. A statement in fact by Theophilus, the translator of Justinian's Institutes³¹, that calata comitia took place twice a year, which was once questioned, has been confirmed by the discovery of Gaius' original. These days are, with his usual perspicacity, identified by Mommsen as the 24th of March and the 21st of May³². An inconvenience, which occurs to one at first sight, of arranging the days so near one another, is to be accounted for, not by supposing them to be determined on some independent ground, but fixed with the express purpose of the second serving, at a short interval, as a supplementary occasion for those who have neglected to avail themselves of the first, and normal, one³³.

Q.R.C.F. Mommsen's identification is confirmed by a fragmentary passage in Festus which informs us that after some ceremony connected with the rex (sacrificulus) the 24th of March becomes e nefasto fastus³⁴. The few legible words quoted here probably indicate, as they are supposed to do, from comparison with a passage of Varro³⁵, the fitness of the latter part of the day for legal (or statutory) procedure generally. The note on this day, in Verrius' own Fasti,

⁸¹ Theophilus, Instt. 2. 10: Gaius, 2. 101. The original meaning of the word (special summons) was, therefore, henceforth lost sight of, and the fact of pontifical presidence became the virtual significance of the epithet, see § 10, n. 19^a.

³² Msr.³ iii. p. 319, n. 1 and more fully, Röm. Chron.³ p. 242, n. 30. This note gives the passage from the remarkable Praenestine *Fasti* of Verrius Flaccus (see Teuffel (Warr), § 74. 3, vol. i. p. 105).

Secondary the application of the same principle in the Fornacalia, § 9, p. 323. This, I think, meets Karlowa's objections, RRg. ii. pp. 847, 848.

³⁴ Nothing more can be proved from Festus, F. p. 278 (where the heading of the fragment, Regifugium, is due to an emendation) except that the ceremony referred to came from Etruria.

³⁵ Varro, L. L. 6. 31. Intercisi dies...ab eo fas: itaque post id tempus lege actum saepe. This passage again is corrupt, and I consider the feeble saepe impossible for Varro: but I am not editing Varro.

mutilated as it is, may, on the other hand, have referred specially to the making of wills³⁶. Anyhow this passage of Festus is conclusive against the identification of March 24 with the day of the Regifugium (Feb. 24), whatever that observance may have meant³⁷. I venture therefore to translate the words quod eo die ex comitio fugerit [rex], "because, as they (wrongly) believe (see Roby, Grammar, ii. 1744), it was, on that day that the king fled," and to explain the Q.R.C.F. of March 24 as meaning that after the King, or King Pontiff, has arrived, to make good the session, the business may begin: not before³⁸.

I have spoken already (§ 10, p. 369) of the lex curiata which, in republican times, accompanied the entry upon office of the ordinary magistrates auspiciorum causa, and which would seem therefore to have come to carry with it the religious sanction perhaps originally confined to offices specially religious and, for a long time, the appanage of the patrician order alone³⁹. The monopoly of the auspices constituted an important aristocratic check in the struggle between the orders (see below, n. 46). Indeed a champion

³⁶ Reading, in note 30 of Mommsen's Chron. qu[are potius licere testament] a fieri instead of the word [judici] as usually suggested.

s³ See Ovid, Fasti, 2. 685. This too would seem to be the view of Paulus (Diaconus), from his version of Verrius Flaccus, Müller, p. 259. Except for Plutarch, Quaestt. Rom. 63, the view that session only opens after the King has left or fled, depends entirely, so far as I can see, upon emendation. I scarcely dare to suggest a return to the old explanation of Regifugium after the elaborate structure raised, upon a different one, with so much learning and literary ability, by my friend Sir James Frazer: but I must confess that I see little direct foundation for it but the last words of Plutarch's gossiping story (l.c.).

⁸⁸ Karlowa, RRg. ii. p. 847, questions such a meaning of *comitiavit*. It appears to me too obvious to need instances.

³⁹ Mommsen insists upon a strict distinction being maintained between inauguratio for religious and lex curiata for secular office. Msr.³ i. p. 609, n. l. But cf. Cicero, de leg. agr. as cited in n. 66^a to § 10 and ll.cc. in next note (40).

of the aristocratic party is made by Livy to base the validity of a Consulate rather upon the Consul's creation auspicato than on his election by the People⁴⁰.

The Pontiffs in connexion with family law. Having spoken, in the earlier part of this section, of the Pontiffs' surveillance over public religious celebrations, particularly of the ceremonial entry upon office, of the chief Roman religious officers, before a special assembly of the people, as organised for legislation, I pass to the more detailed consideration of a similar surveillance of the same authorities over meetings of the people in the same curiate organisation, but called together for more private or family occasions, and in the character, as to one class of such occasions, distinctly rather of witnesses than legislators. The ground of this surveillance, or intervention, was, as indicated above (§ 5, p. 142), that the Pontiffs, as heads of the national religion, were concerned in the preservation of the sacra, which had become a part of that religion-if they were not rather its original constituent elements-viz. the religious observances belonging to the original gentes and the families composing them; which surveillance extended to any new association of a similar kind that might be admitted to the name and character of a gens (§ 7, p. 272). Hence their interest in the purity of family descent and the prompt devolution of family property, "ut essent qui sacra facerent41." Hence their presidence over the ancient religious marriage42, peculiar once to the original patrician families; over the act of arrogatio, and the old testamentum comitiis calatis (§ 10, pp. 375, 376). The greater part of this subject has been

⁴⁰ Livy, 4, 6. Interroganti tribuno cur plebeium consulem fieri non oporteret, respondit (alter e consulibus) quod nemo plebeius auspicia haberet. See too the latter part of 6, 41.

⁴¹ See below, n. 45.

⁴² See above, § 3, p. 77; § 7, pp. 271, 272. With coemptio or usus the Pontiffs do not appear to have had anything to do.

already treated in the sections dealing directly with family or gentile law, or with the functions of the *comitia curiata* and the part actually played by the people on such occasions as the above, in which their presence is alleged. It is only necessary now to give a brief resumé of what has been stated elsewhere, with specific reference to the particular part of the Pontiffs.

The representation of the curiae by the thirty lictors has been shewn (§ 10, pp. 370, 371) to be old in the days of Cicero: a hundred years after his time, the only persons present at arrogatio may have been the Pontiffs, to judge by a speech which Tacitus puts into the mouth of Galba. The formality of a lex curiata in arrogatio would appear to have survived to the time of Gaius and Ulpian, but was superseded in that of Diocletian by Imperial rescript, and appears simply in Justinian as the auctoritas of the Emperor⁴³.

In the Pontifical presidence expressly required for arrogatio (§ 10, p. 373) the Pontifis are evidently regarded as the guardians of the public religious interest. There may possibly have been in the original transaction some idea of giving the agnati and gentiles interested an opportunity of protesting against an arrangement unfairly affecting their pecuniary interests⁴⁴; but there is no doubt that the main object originally was to see that there was no danger of the populus being compromised in the eyes of Heaven, by the

⁴³ Tacitus, Hist. 1. 15: Gaius, 1. 99 and Ulpian, 8. 3—5. Compare finally Just. 1. 11. 1 with Code 8. 47. 6 (293 a.p.). Gaius does not mention the presidency of the Pontiffs, though it may be perhaps inferred from 1. 132. He could scarcely have been ignorant or unobservant of a fact so strongly insisted on by his contemporary Gellius (see Sources, pp. 93, 126, and above, § 10, n. 194).

⁴⁴ See below, n. 46. Also § 4, p. 117, and Gellius, 5. 19. 6. The religious presidency required for arrogatio is alone sufficient evidence for its superior antiquity over adoptio proper, in which the public supervision, such as it is, is of a purely civil character. For the comparative antiquity of arrogatio or testamentum, see below, p. 447.

sacra, which were such an important part in the life of the State and its constituent elements, being left without proper support and maintenance.

Karlowa (ii. p. 849), in speaking of the testamentum comitiis calatis, makes some point of a distinction between concern for the preservation of the sacra familiaria and gentilicia, but the safeguarding of either appears from Cicero45 to have been equally an object of Pontifical concern. In either case, the transfer of a possible paterfamilias from one family to another might imperil the sacra of the former, or of the gens to which it belonged, by the possibility of extinction, and must, at any rate, increase the burden or obligation of those upon whom the preservation of such sacra was still incumbent. On the other side, the introduction of a stranger was not looked upon with favour, unless there was likely to be a failure in the direct succession and representation of the family, into which he is to be introduced, which failure the object of his introduction is to prevent. These are the main points on which the Pontiffs require, or should require, to be satisfied: the function of the comitia appears to be merely to pass the rogatio in accordance with their decision46.

⁴⁶ There might be still intended some opportunity of protest, on the part of those interested in the ordinary legal succession to the parties (see Gellius, 5. 19. 6): but, comparing the chapter generally of Gellius with Cicero, de domo, 13—15, we see that the chief point of the orator's impeachment of the arrogatio of Clodius consists in the propriety of the Pontiffs' approbatio: the lex curiata follows as a matter of course: the only hole to pick in that part of the proceeding is that it was not carried auspicato. On this Cicero is not always consistent. The 40th section, in the speech de domo, seems to allege that the auspices were observed, and, as of course generally happened when a veto was intended, proved unfavourable. At



⁴⁵ See above, § 4, p. 124; § 5, p. 142. Some account of this matter is given in Cicero, de legibus, 2. 19—21 (47—53), the detailed provisions (e.g. as to the connexion of the property with the eacra), having been no doubt elaborated by later Pontiffs. See too the first reason given by Gaius, 2. 52—56, why the improba possessio et usucapio which is said to be pro herede was once allowed, ut essent qui sacra facerent.

Sacrorum detestatio. In the two cases of the employment of calata comitia, for what we should consider private purposes, mentioned by Gellius (above, p. 438), the first, sacrorum detestatio, must, as it seems to me, be necessarily either an integral part of arrogatio or an essential preliminary to it. This has sometimes been regarded as a notice to take up the burden of family or gentile sacra⁴⁷; but, from its connexion in Gellius with the oldest form of will, it evidently dates from a far earlier time than when the sacra began to be viewed in the simply onerous light, so that hereditas sine sacris was a term used to denote any lucky windfall. Our detestatio is more probably a formal renunciation of his old religious traditions and practices by the adult who was to be arrogated⁴⁸.

The testamentum comities calatis is designated by Mommsen in the words quoted above (§ 10, n. 48) as a statutory act⁴⁹, although it is expressly said by Gellius to take place in populi contione (above, p. 438). Jhering appears to take the same view, since while he recognises that its effect is to place the will under the guarantee of the people, he scouts the idea of their office being merely witness. It is, on the contrary, strongly contended, by Karlowa, that the presence of the populus is nothing but an act of solemn attestation^{49a}. Now the old lex curiata may, as pointed out another shifting phase of the intrigue between Caesar and Pompey, it appears to be Cicero's interest to make them out favourable. Compare Cicero, ad Att. 2. 12. 1, 2, with de prov. cons. 19. 45.

⁴⁷ This meaning might be borne by the word in Ulpian, Dig. 50. 16. 40. pr.

and Gaius, ib. 238. 1.

49 Msr. iii. pp. 319, 320. Jhering, i. pp. 146, 149, n. 58°; also ib. pp. 220, 222.

⁴⁸ As apparently was done by Clodius. Dio only says (37.51) ἐξωμόσατο τὴν εὐγένειαν, but see Cicero, de domo, 13. 34. On detestatio generally Mommsen, Msr.³ iii. p. 39, n. 1 and particularly Servius on Aen. 2. 156.

^{49a} Karlowa, RRg. ii. p. 851. The vigour or, as he himself calls it, the animus (Eifer) of Karlowa has here, as sometimes elsewhere, like the elegance of Maine, carried the day against the more reasoned view. Cuq, however, is with him; as well as the superior authority of Girard⁵, p. 803, n. 1.

above (§ 10, p. 371) have become a mere formality, but it was a formality actually observed, in arrogatio, from the old times down to those of Augustus⁵⁰: whereas the point of distinction in a contio is expressly stated to be that Parliamentary proceedings can not take place at it (above, n. 9a). For this and various other reasons stated by Karlowa, I am inclined, contrary to my wont, to side in this instance, with him against Mommsen and a majority of modern authors. I question, indeed, any previous right of Testation which Karlowa seems to assume, though I agree with him that the words itaque vos of Gaius, 2. 101 may well have been borrowed from the testamentum calatis comitiis⁵¹.

This view, of the function of the meeting being merely attestation, which it must be remembered, carries with it an *implied* recognition and guarantee, seems also more suitable for the other old form of will mentioned by Gaius in the same passage (2. 101), the **Testamentum in procinctu**.

The meaning of this phrase is scarcely fully expressed by the literal translation in battle array. The warriors, whose summons is described in the interesting Scholium to Virgil 10. 241⁵², are in line and just about to proceed into action. It is exactly "one moment while the trumpets blow." In such a moment there would be little time to do more than name a heres: and probably in the testamentum comitiis calatis a selection among the persons, who would naturally have taken on intestacy, was all that was competent to the earliest testators (see below, p. 447). The presidency of the

 $^{^{50}}$ See Suetonius, Augustus, 65. Privignum Tiberium adoptavit in foro lege curiata.

⁵¹ Karlowa, RRg. ii. pp. 848, 849, 851. They are indeed better suited (as Girard admits, p. 803, n. 1) for an audience of the whole people than of the five witnesses and the libripens.

⁵² Given in substance, Msr.³ iii. p. 307, n. 2, also by Gneist in his note on Gaius, 2. 101. That, however, this testament is any argument for an *original* military use of the *curiae* (see above, pp. 307 sqq., 359) I doubt, in face of the general testimony to their religious destination.

Pontiffs, which is distinctly stated in arrogatio and implied in the style of the so-called 53 comitia, at which these wills were made, in time of peace 54, could no doubt be relied upon against any inofficiosum testamentum of those early days. The recognition of legatio by the Twelve Tables, if, as will be shewn hereafter, it was a necessary supplement to the third will (per aes et libram), appears to me conclusive against any such power being enjoyed under the two earlier forms.

Comitia calata centuriarum. The extension above referred to (p. 433) of comitia calata to the centuriate arrangement of the populus may have been sufficiently accounted for by the suggestion of Mommsen (above, p. 444) but I am inclined to think that a better reason is to be found in the obvious general intent of the Servian system, i.e. a fusion of the orders in one military commonwealth.

It is not of course impossible that the curiae, whether exclusively patrician or not, may have condescended to take cognizance of the wills of their local non-gentile residents⁵⁵. Anyhow I think it extremely unlikely, considering the close connexion of these calata comitia with gentile sacra and property, that they should have done so in the case of any Plebeian, who had not been in some way recognised by the Pontiffs as partaking of gentilitas and consequently assigned to some curia⁵⁶.

⁵³ Gellius, 5. 19. 6; 15. 27. 3. Unum (testamentum) quod calatis comitiis in populi contione fieret.

⁵⁴ In pace et in otio, Ga. 2. 101. For this probable restriction of testatory power, see Karlowa, RRg. ii. p. 848.

⁵⁵ So Karlowa, ii. pp. 848. 853.

⁵⁶ See above, § 7, p. 269 and Msr.³ iii. p. 75. Mommsen himself considers (Msr. iii. p. 78, cf. Karlowa, ii. p. 853) that the Plebeian, simply as such, was excluded from participation in the comitial Testament until he attained the right of voting in the comitia curiata, which he holds took place, at the latest, in the year 209 B.C. His reasoning is contested by Karlowa, l.c. on grounds which I cannot accept as altogether satisfactory, but which will be examined when I come to deal with the third form of testament. Thus

These cases cannot have been in the earliest times many. It would seem therefore that the Servian system which apparently gave the plebeian citizen, simply as a holder of landed property, a place on the census roll, should also have given him a similar right of testation to that enjoyed by the member of a gens. This could be done in time of peace by the extension of the idea of calatio to the centuries. In time of war I assume the will in procinctu still held good, mutatis mutandis⁵⁷.

Competence for testation being supposed to be then assured for the Plebeian, there remains the question of convenience, or rather inconvenience. It is possible that the system of calatio centuriarum may not have been looked on with much favour by the Pontiffs, whose presence was essential. The few occasions provided for these comitia would also be absolutely incompatible with any sudden necessity arising for making the will. That it could be made, under the existing system, is clear from Gaius' words "if a man had neither made his will at the calata comitia, nor in procinctu, and was in danger of approaching death" he might use the mancipatory trust next described 58.

Scope of comitial testament. It has been suggested above (p. 445) that the power of Testation comities calatis was probably limited to the selection of a heres, among those who would naturally have taken, on intestacy and, from this point of view, one would not unnaturally regard arrogatio as an older institution than Testation. But this is not the much seems clear that this third form precluded the necessity for any testamentum calatis comitties centuriarum, which could only have been required before its establishment.

⁵⁷ Mommsen's arguments that this could not have been in comitatu centuriato, are most unsatisfactory, Msr. ³ iii. p. 307, n. 2. Whether the declaration was considered to take place, on the field of battle, before the curiae or the centuriae it could equally have only been heard, in practice, by the surrounding comrades of the testator, "vor den nächstelehenden Kamaraden."

⁵⁸ Gaius, 2, 102.

opinion of Mommsen, who expressly places it later⁵⁹, on what ground he does not say.

Adoption by testamentum, again, would seem naturally to have preceded the testamentum general: but of this form of adoption, which in gist and effect has much the character of arrogatio, we have only few and late instances.

Whether the first wills included any "donations of freedom" as appears to be assumed by Poste (Gaius⁴, p. 24) I very much doubt. The inhuman practices resulting from the principle stated in note 66 to § 5A are much more likely. (Orcinus, Inst. 2. 24. 2, is apparently quite a late word, Codex, 7. 2. 10.) Testamentary manumissions had however, become a practice before the Decemviral Code, which recognised and confirmed them (Ulpian, 1. 9).

That the old comitial will must have contemplated, as its main object, the institution or selection of a heres, there would never have appeared to be any doubt, but for the remarkable article in which Professor Lenel has recently contended that its only object was legacy⁶¹. Mommsen indeed appears in a note to have somewhat favourably anticipated this view; but the words of the Twelve Tables, upon which he seems to base the legal validity of the Mancipatory Testament, as a whole, may, I submit, be better interpreted as referring merely to the legacy part of that will, the validity of which was not considered to be sufficiently assured by the general terms of the cum nexum &c. clause and therefore to require a special statutory recognition⁶².

⁵⁹ Msr. 3 iii. p. 21, n. 3. I venture most distinctly to differ from him.

 $^{^{60}}$ ib. p. 39, n. 2. The best known case is that of Octavius' adoption by Caesar (Appian, B. C. 3. 11).

⁶¹ Essays in Legal History (ed. Vinogradoff), 1913, pp. 120 sqq.

⁶² Uti legassit ita jus esto. For the various forms in which this clause has been handed down to us, see Bruns', i. p. 23, n. 3. The note of Mommsen referred to is Msr. iii. p. 319, n. 2.

Part played by the populus. As was indicated above (p. 445), the part played by the people, in the comitia for arrogatio, differs materially, in form if not in substance, from that of the contio in the testamentum. The lex. by which63 the L. Valerius of Gellius becomes subject to the power of life and death of L. Titius, may have followed, as a matter of course, on the Pontiffs' expressing their approval, and the "people" of the curiae may have easily come to be represented by the thirty lictors: still it evidently was passed. in the regular mode of enactment historical in republican times, as was the lex curiata de imperio (see § 10, p. 372). The lex, in a statutory sense, of the testamentum comitiis calatis, is, as well as its suggested successor in the testamentum per aes et libram, a pure assumption of modern writers. Mommsen himself speaks generally of the competence (Handlungsfähigkeit) of the Commonalty as limited "in the oldest Roman order" to giving its "assistance" and pledging its faith. It is from the assumed power of refusing such a pledge, that he seems to infer a resulting power for legislation⁶⁴. But his reasoning on this subject is to my mind as unsatisfactory as his explanation of lex generally, which he first makes to be Bindung (clearly connecting it with ligare) and then in a note accumulates evidence in favour of the laying or lieing which is really the root idea of our word law65.

es In Gellius, 5. 19. 9 the words are jure legeque. The fact that a genuine patrician is represented as being arrogated to a mere Richard Roe (L. Valerius L. Titio) is a significant reference to the case of Clodius, which throughout causes some difficulty in the subject of arrogatio. Amongst other things, it may be remarked à propos of Cicero's vehement language, that the gens Fonteia, though only an "arrived" plebeian family, is, to judge by its coins, one of respectable antiquity, not at all unlikely to have been recognised. in comparatively early times, by the Pontifical authorities.

⁶⁴ Msr. 2 iii. p. 306 and following pages. See above, § 10, p. 374, n. 48, &c. and compare Jhering 5, i. p. 146, n. 565.

⁶⁵ Msr. iii. p. 308, n. 4. Jhering in i. p. 218 evidently takes imposition to be what is indicated by lex: the binding character he transfers to jus.

About the supposed legislative character of the comitial testamentum a great deal of ingenious reasoning has, in my humble opinion, been evolved out of a mistaken view as to the etymology and therefore the original meaning of this word lex. It undoubtedly existed before the Twelve Tables, for legare in that code is evidently to make a lex, for the guardianship of a man's property generally, or the disposition of a particular part of it. It is not, however, my purpose to enter here into the explanation of the uti legassit clause. For the original meaning and early uses of the word lex I can only refer to an explanation of my own in Jurisprudence, i. pp. 303—305, particularly n. 15 on p. 303.

Sacral law. A great part of the early criminal law of Rome is of what is called a sacral character, that is it deals with offences considered as sins to be expiated either by devotion of the offender to some deity offended, or by minor offerings. The cognizance of such matters would naturally fall to the State Purifiers. Whether, however, that be the true meaning of Pontiff or no, it has been generally received that sentences in these cases were at one time pronounced by the chief Priests of the nation, and, in the more serious cases of devotio, before an assembly (contio) of the people, whether taking any immediate part or not in the judgement seems doubtful. This question, however, will be considered hereafter.

Many authorities, including Mommsen⁶⁸, appear to recognise a distinct criminal law proper, existing by the side of this "sacral" law from the earliest times. They account

Supplicium (capital punishment) has been held to be derivationally a pacification of the Gods, see Jhering⁵, i. p. 278 and Littré, Supplice.

⁶⁷ Regiae leges, § 18, pp. 581 sqq. See too Jhering, i. pp. 281—284, as to penalty arising ipso facto from certain specified offences. But how could some declaration be dispensed with?

⁶⁸ See Mstr. p. 900.

for the connexion and confusion of the two by the fact that the chief secular and religious authority were, after the complete developement of the Royal Sovereignty (see § 15, p. 457) united in the same person⁶⁹. I think it more consonant both with Roman tradition and with external analogy particularly in the same branch of the Indo-European stock⁷⁰ to trace the earliest Roman conception of public offence generally to that of sin, and to recognise, in the idea of crime independent of sin, a comparatively late developement of the regal period. The effect produced on the Pontifical jurisdiction by the subsequent separation of the religious and secular authority belongs to the beginning of the Republic and will accordingly be treated later on.

On the action (if it can be called by so definite a name) of the People, in the earliest days of a religious sentence by the Priest, I have already spoken⁷¹, and shall return to the subject in speaking of sacratio.

Private wrongs. Of early jurisdiction with regard to private wrongs, or controversies as to property, we know but little, and that little takes the form of vague statements, in connexion with the Servian reform, or rather the personal reformer of tradition. What we have of definite information to go upon is this—that the form of procedure originally common to all actions involves the preliminary creation of a religious liability by making of oath⁷²—which may have been necessary to give cognizance to a religious Court. I need not say that I refer to the sacramentum, which I am unable to regard, in Sir Henry Maine's view, as a bet. The

⁶⁹ Msr.3 ii. p. 50.

⁷⁰ See § 9, App. p. 348 on Greek land-pollution. The same phaenomenon in the Semitic Hebrews is perhaps to be accounted for on grounds peculiar to that nation.

⁷¹ § 11, pp. 393, 394.

⁷² Muirhead¹, pp. 192—4 (of. however ed. 2, p. 177): Jurisp. i. pp. 34, 306, n. 214; E. R. L. p. 89.

loser's forfeited deposit is not a gain of the winner, but a fine paid in atonement of his false oath by the loser. That it practically becomes a Court fee, as in the Greek case (§ 13, p. 424) is a later developement of the true original principle retained by the Romans: with whom the whole matter is always connected with the religious Board, one of them being specially appointed by his colleagues to superintend this class of business 73 on the establishment of a Republic. For the subject of sacramentum in detail and the remarkable survival of this connexion of civil procedure with religion, after the absorption of the main religious authority in Royalty, see the later sections on Regiae leges.

Scabini. I venture here, I fear it may be thought somewhat irrelevantly, to refer to an ancient Teutonic office, from its possible bearing upon the origin of Sovereignty as an aggregate of authoritative functions. For the office in question was, like that of the $\beta a\sigma i\lambda \epsilon \dot{\nu}_{S}$ and pontifex, once judicial, and it is, in point of origin, one of great antiquity, having been evidently like gerefa (§ 12, App. pp. 409 sqq.) misconceived from very early times.

The middle age name, given above, for the modern French échevin, cannot, as a recognised title of office, be dated before the alleged institution of that office by Charlemagne: but the philological investigation of that name points to a decidedly earlier period. The Teutonic skapjan, from which scabinus comes, is given by Kluge as meaning to arrange, decree, decide. The root is not found, in this simple form, in Gothic; the forms, in which it is found, indicate creation (or shaping) rather than judgement: but the Teutonic meaning given by Kluge, and the functions of the office, as instituted, or adopted, by Charlemagne point to a very

⁷³ Pomponius, Dig. 1. 2. 2. 6. This particular surveillance it was which made the Pontiffs, down to the times of Ap. Claudius Caecus and Cn. Flavius 304 B.c. the custodians and draftsmen of private legal procedure.

early administration of justice, among the continental Teutons, by plural judges, before a popular assembly, which was assimilated or appropriated by the final Sovereign, but possibly existed long before him⁷⁴.

⁷⁴ See § 11, p. 393. On Scabini Kluge s.v. Schöffe; Skeat, St Mark in Gothic, Glossary, s.v. ga-skapjan; Stubbs, C. H.⁶ i. p. 115 and Spelman, Glossarium, s.v. Scabini.

§ 15. THE SOVEREIGN. REX

MUCH of jus Quiritium pre-Tarquinian, p. 454. Administration of justice a factor of Sovereignty, 455. Roman Monarchy not immediately from Tribunus, ib. Rex a general term, 456. Corssen's theory, ib. In Roman use the judicial function intended, 457. Different views on this: Ihne, Jhering, Karlowa, ib. The King and tribune, 459. The sex suffragia, ib. The King and Pontiff, 461. Rex sacrificulus, 462. Festus' Ordo sacerdotium, 463. Pontifex minor, ib. Rex always patrician, 464. Republican appointment of pontiffs, ib. Effects of subordination to King, 465. Regal administration of Justice, ib. Capital charges: suggested consilium, 466. No coordinate judicial authority, 467. Quaestores and duumviri, ib. Civil jurisdiction of king, 468. King and Senate, 469. Division into majores and minores, 470. Complete sovereignty attained in Tarquinian dynasty, 471. Original division or redistribution. 472. This Sovereign's great power, won by great concessions, ib. policy of Tarquinius, 473. Mommsen's preference for the Romulian Scheme, 474. υβρις Φυτεύει τύραννον, 475. Appendix: Corssen's original King, 477.

Much of Jus Quiritium pre-Tarquinian. The developement of Roman Law will, by many—of course by all the more devout Austinians—not be considered to begin before what I think may be accepted as the historical establishment of a true sovereignty, in the family of the Tarquins. Yet a good deal of the special Roman Law or Right—the jus quiritium—must apparently have been in existence from a time when the presidency over the people was rather that of a Priest or Priests than of a King. I may roughly designate this previous period as pre-Tarquinian rather than pre-Servian because the system usually connected

with the second name undoubtedly represents the reform or alteration of a previously established state of things. To this pre-Tarquinian period will generally be admitted to belong the peculiar family organisation with the extreme power of the male head, the old religious marriage, possibly the original rules of succession which have been indicated in the account of the larger familia; certainly the association of the gens and curia, the Senate, the popular assembly by curiae, and the three Tribes. Matters which have also been suggested in the preceding sections, such as an original duality of tribus, with certain different degrees of social developement, a consolidation of the two with a third element and a joint organisation and redistribution under a power, gradually acquired, of sole Sovereignty, will not be accepted without some grounds of probable inference, which I have endeavoured to supply: proof, of course, for such prehistoric matters, is impossible.

Administration of Justice a factor of Sovereignty. The Administration of Justice is generally and rightly regarded as a primary object of political associations which answer our definition of States. It has here been taken to date from further back and to constitute a factor in their original formation. This has already been to some extent considered in the sections devoted to those minor or temporary powers which I regard as concentrated in the supreme authority of which we now come to treat. And it is specially through the judicial office that I propose now to treat the Pontificate as leading up to the Monarchy which closes the absolutely prehistorical developement of the Roman Polity.

Roman monarchy not immediately from tribunus. This Monarchy I do not conceive to arise out of the office, if office it can be called, of the original *tribunus*—an occasional leader or chieftain never, strictly and properly speaking, either a Judge or a King, but resembling rather the Northern

adventurers who first make their way into Neustria or land in Britain.

The permanent and general authority, which I do not date before the first Tarquin, seems with more probability to arise from a combination of this military power with the administration of Justice which can be shewn in Rome to belong to the province of Priest, as in the well-known parallel in the First Book of Samuel.

Rex a general term. Rex is a word etymologically of very vague signification, inclining perhaps rather to the idea of Judge than to that of Priest: in the case of the Tarquins tradition points to the idea of a military government superseding a sacerdotal one. Anyhow, when the great Etruscan dynasty was established in which the Roman kingdom probably began, and certainly ended, the sacred had become subject to the secular one. The non-regal Pontiffs—for the King, it must be remembered, was himself a Pontiff, and the head of them—became mere recorders and formulators, probably nominal referees, but no longer administrators of justice. The tribunus was now a mere lieutenant of the King; the Senate a body of counsellors apparently consulted or not as the King might choose.

On the functions of the assembly, and of the Senate, particularly as reviving on the demise of the King, sufficient has been said above, § 8, App. and § 10.

Corssen's theory. Before proceeding, however, to the treatment more in detail of the reputed functions of the Roman king, which have been briefly anticipated above, I must say a little on the theory of Corssen referred to in a previous section (§ 11, p. 399), which is directly contrary to the view here maintained of the gradual development of Roman Sovereignty. But this is too much in the nature of a digression to be treated otherwise than as an Appendix, in which will be found my reasons for not accepting Corssen's view.

In Roman use, the judicial function intended. My own theory is that when the office of rex first arose at Rome, before the full developement of Sovereignty, the functions specially intended by the name were judicial or magisterial, which is, I think, on the whole the opinion of Mommsen¹. The judicial character of the ultimate King is, I need not say, perfectly established on other grounds than etymology.

Of the fusion of other offices, approximating to Sovereignty, with this, those of the pontifex and tribunus are obviously sacerdotal and military, whether the names designated heads of different tribes or different officers of the same tribe, or, ultimately, as I rather believe, different stages of development of office in the same united people. The office and title of rex was the one which ultimately became chief, at a time when union, on terms of political equality², or amity, was possibly of more moment than external action against a common foe, which would rather have tended to emphasise the idea, if not the style, of a common tribunus. For whatever reason or special occasion, the three powers did become consolidated into one, and the tribunate and pontificate proper were placed on an inferior footing, their main authority being absorbed by the rex.

Different views: Ihne, Jhering, Karlowa. This view is not universally held. Ihne, in his "Early Rome," regards the dynasty of the Tarquins (including Servius Tullius) as a military kingship of Etruscans, superseding a purely sacerdotal one of Latins, the latter functions being now conferred on the Pontifi proper³.

¹ Msr.³ ii. p. 14.

² See § 6, p. 245. The need expressed in the later part of the sentence is more often considered to constitute the immediate genesis of Sovereignty. See Jurisprudence, i. p. 164.

³ Ihne, Early Rome, p. 85.

Jhering, placing the origin of the kingdom in war, considers the rex to have been primarily and properly a military leader, and the Tarquinian Kingdom not to have been so much a consolidation of several offices as an extension of one. The King's sacerdotal function he holds to have arisen from the right of a general to assemble, and perform sacrifice for a Host, relying a great deal upon the curiones, whom he regards as primarily military heads of the curiae. The King's judicial powers he conceives to be a developement of the imperium of the military leader, gradually trenching upon an original Court of the People, which regains its rights by establishment of the provocatio or appeal to the people⁴. The clear opinion of this great jurist is in marked contrast to the obscurity of others.

According to Karlowa it would seem that any view which gives special prominence to one of the functions of commander in chief, judge or priest gives an incorrect and one-sided idea of the indivisible Roman Royalty^{4a}. Very little definite, beyond the negation of popular establishment or appointment, can be made out of the three or four pages devoted by this author to the subject; to which Girard contributes nothing but a description of the King standing in the same relation to the community as the paterfamilias to his family⁵. This is a stock matter of comparison with authors ancient and modern.

But whatever be the date of the completion of Roman Royalty—whether the prehistoric Romulian time of most historians, or the approximately historic time of the Tarquinii, there is a general agreement that, by that time, the sacerdotal had become subject to the secular power. I do not

⁴ Jhering⁵, i. pp. 252—254, 257, 258.

⁴a Karlowa, RRg. i. pp. 27-29. See too Cuq, i. pp. 36 sqq.

⁶ Girard⁵, p. 13. The same passage, however, gives a valuable explanation of the method by which the Roman Court originally acquired jurisdiction over civil cases.

quote the ordo sacerdotium of Festus^{5a} in support of this assumption, though it is unintelligible without it, because that ordo, however old, contains unmistakeable signs of post-Tarquinian origin⁶. A much earlier date must be given to those primeval institutions the quaestores parricidii and the duumviri perduellionis, both of whom probably existed from a time when the constitution of Rome was a duality⁷.

The attribution of this or that principle of Sovereignty definitely to one or other of the three tribes cannot be maintained by any positive evidence; and the same objection appears to me to apply to Jhering's theory of development and encroachment. We can only take the offices of King, Tribune and Pontiff as we find them in our nearest approximations to history: and their mutual relations at that time are to my mind decidedly more in favour of the fusionist theory stated above.

The King and tribune. The position of the King as generalissimo is beyond all doubt, if consistent and uniform tradition goes for anything. But, by his side, we find the tribunus celerum also in high military command. Whether there were ever two tribuni of separate tribes, or two different offices in the same tribe, or people, we have no means of deciding. It certainly seems possible that an original independent or coordinate power of a tribunus had been absorbed by the rex and the former office retained as a sort of lieutenancy of the latter⁸.

The sex suffragia. The present seems the best place for considering in more detail the addition made to the cavalry by Tarquinius in connexion with the increase of

^{5a} Festus, F. p. 185. Maximus videtur Rex, dein Dialis, post hunc Martialis, quarto loco Quirinalis, quinto Pontifex Maximus.

e.g. the triad of the three great Flamens. Cf. the three Deities, § 6, pp. 250, 251.

⁷ See § 6, p. 231.

⁸ See Seeley, Livy², p. 90.

the Senate by the introduction of the patres minorum gentium, of which the accounts are so difficult to reconcile (see § 8, pp. 288, 289). The sex suffragia is an institution which has left its traces, in connexion with the organisation of the Roman army, down to perfectly historic times (see, besides the passage quoted, § 6, p. 233 and § 12, nn. 8—10).

The theory of Marquardt, that down to the war with Perseus, the cavalry was the most important arm of the Roman military, must be rejected, partly on the ground of its intrinsic improbability, and its inconsistency with general tradition, partly on account of the inadequate evidence furnished, as it seems to me, by the passages cited in support of it^{8a}.

The account which Livy, distinctly referring to his own times, gives of the sex suffragia is fairly simple and reconcileable with the important passage of Festus, which must not be rejected, as it is by Seeley (l.c.) on account of an immaterial corruption.

Another passage throws light upon this doubling of the old Ramnes, &c. 9a "Tarquinius, then, did not, in consequence of the remonstrance of Naevius, make any change in the Centuries of Knights: he merely added as much

⁸a Marquardt, Staatsverwaltung, ii. p. 322 Above, p. 285.

⁹ Livy, 1. 36. Tarquinius...ad Ramnes. Titienses, Luceres, quas centurias Romulus scripserat, addere alias constituit.... Then follows the story of Naevius. Neque tum Tarquinius de equitum centuriis quicquam mutavit: numero alterum tantum adjecit. Posteriores modo sub isdem nominibus qui additi erant appellati sunt, quas nunc, quia geminatae sunt, sex vocant centurias. Festus, F. p. 334. Sex suffragia appellantur in equitum centuriis, quae sunt adfectae (Müller, adjectae) ei numero centuriarum quas Priscus Tarquinius rex constituit. I venture to alter adfectae to adfecta and translate "which are attached," from affigo.

⁹⁸ Festus, F. p. 344. Sex Vestae sacerdotes constitutae sunt ut populus pro sua quaque parte haberet ministrum sacrorum, quia civitas Romana in sex est distributa partes, in primos secundosque Titienses, Ramnes, Luceres. For making up the actual numbers of Knights, see Msr.³ iii. pp. 107, n. 3, 254, n. 1. For the story of Naevius, told of the last days of Priscus' reign, see Dionysius, 3, 72: also Festus, F. p. 169, Navia.

again in number. The later ones added were called by the old names: which, as being doubled, they now call," says Livy, "the six centuries." The sex suffragia were an aristocratic but not exclusively patrician body (Seeley², p. 79).

I must therefore here admit a slight variation of the theory adopted in § 6 and elsewhere: and while accepting the view of Varro¹⁰, as to a body of Etruscan auxiliaries aiding the first Roman tribal chieftain, to have some foundation of truth in it, must confine the fundamental reform of Tarquinius to the recognition of an Etruscan contingent as forming, or having always formed, an integral part of the Roman populus^{10a}.

That, possibly towards the end of his reign¹¹, Tarquinius may have conceived a plan of strengthening himself against the hereditary *vendetta*, to which he ultimately became a victim, is probable enough. Into the origin of the story of Nebius, or Naevius, it is not necessary to enter.

King and Pontiff. The traditional accounts of the Board or corporate body, to which the Pontiffs of the reformed or reconstituted Roman Polity belonged, are difficult and conflicting. They appear to be best reconcileable on the supposition that originally the King, himself a Pontiff, the three Flamens and a Pontiff proper constituted a Board of five.

The vague talk of an institution of religious officers in general by Numa, in the speech which Livy puts into the mouth of Canuleius¹², may be cited in favour of an original plurality, but does not go for much. The mere specific

¹⁰ L. L. 5. 46: see too above, § 6, nn. 40, 41.

¹⁰a This principle once established, the other triads naturally follow, in the hands of a political organiser.

¹¹ Dionysius, 3. 71.

¹² Livy, 4. 3, 4. See Dionysius, 2. 64 for the Flamens, 2. 73 for the Pontiffs: Pluterch, Numa, 7, 9.

statement in the first book of the same author^{12a} agrees with the view taken above except that the King himself is not enumerated as a Pontiff and the one appointed by the King—obviously the ultimate *maximus*—has the general control over all religious matters given him by formal commission.

The publication of these particulars by the fourth king, from the notes of the second¹³, is a part of the legend not material to the present subject, except as shewing that the rex proper had come to be regarded as distinct from the pontiff (see p. 461). This is not, I admit, in favour of my theory of a development of rex from pontiff: but against it may be set the consistent belief in the old sacrificial office of the former¹⁴, and the undoubted historical evidence of a rex sacrificulus, whom Livy represents as expressly created on the abolition of Royalty proper, though placed below the surviving Pontiff¹⁵.

Rex sacrificulus. Whether the diminutive epithet which was used to designate the republican rex, was meant to indicate specially the subordination of the office, on the downfall of royalty, with its hated name, to the pontificate proper, we cannot say. Sacrificulus cannot be relied on as an old form, nor is the reduction below the pontificate stated in Dionysius, 5. 1, who gives the office the name simply of

^{12a} Livy, 1. 20. (Numa) pontificem deinde Numam Marcium ex patribus legit, eique sacra omnia exscripta exsignataque attribuit.

¹³ Livy, 1. 32. Qui (Ancus) omnia ea (sacra publica) ex commentariis regis (Numae) in album relata pontificem proponere in publico jubet.

¹⁴ See particularly Dionysius, 2. 14. βασίλει μέν οὖν ἐξήρητο τάδε τὰ γέρα πρῶτον μὲν καὶ ἰερῶν θυσιῶν ἡγεμονίαν κ.τ.λ. and Msr.³ ii. p. 13. Although, therefore, much new legislation is attributed by the above author, as well as by Tacitus (Ann. 3. 26) and Cicero (de rep. 2. 14. 26) to the second king, the leadership in the sacred work of sacrifice is, from the first, appropriated to the royal office.

¹⁵ Livy, 2. 2. Et quia quaedam publica sacra per ipsos reges factitata erant...regem sacrificulum creant: id sacerdotium pontifici subjecere.

βασιλεὺς ἰερῶν, with that of its first tenant Manius Papirius, a man of peace, ἡσυχίας φίλος. This is most probably the legendary collector of leges regiae, though, as such, called elsewhere, by Dionysius himself (3. 36), Gaius, and by Pomponius (Dig. 1. 2. 2. 2), Sextus. On this apocryphal collection see Sources, p. 17.

Festus' Ordo Sacerdotium. The above allegation of Livy agrees on the whole with Festus' Ordo sacerdotium, except that the latter retains a ceremonial precedence for the rex, who is still designated or regarded as maximus, the regular official Pontiff of that name being only fifth in rank 18. This appears to be the Board of five Pontiffs, whose appointment over the sacra is attributed to Numa by Cicero 17.

The Flamens seem, according to the same passage, to be outside this list (praeterea); but Boethius, commenting on another passage of Cicero, clearly includes them in the pontifical Board when he says, referring to the Flamen Dialis' marriage, confarreatio solis pontificibus conveniebat¹⁸. In Livy, 10. 6, on the occasion of the Ogulnian rogation, the reduction of the number of the pontifical board to four is distinctly represented as accidental¹⁹.

The Pontifex minor is an expression, not much earlier perhaps than Livy's own time²⁰, for the officer of the rex—

¹⁶ On the rather unintelligible explanation of his style in Festus, P. p. 126, s.v. see Msr. ii. p. 52, n. 2. On the rex, see Festus, F. p. 185. Maximus videtur Rex: dein Dialis, post hunc Martialis, quarto loco Quirinalis, quinto Pontifex Maximus.

¹⁷ Cicero, de Rep. 2. 14. 26. Pompilius...sacris e principum numero pontifices quinque praefecit.

¹⁸ On Cicero's Topica, 3. 14, cf. Gaius, 1. 112. It may be remarked that I do not cite the *ordo* as direct evidence of the subordination of the sacred to the secular office, as it bears testimony to its post-Tarquinian character in the triad of Flamens, see § 6, p. 247.

¹⁹ In the face of Livy's plain words, ea tempestate, the assumption towards the end of Msr. ii. p. 21, n. 6 seems to me laboured and unnecessary.

²⁰ The unlucky Cantilius in Livy's story, of 216 B.C. (the year of Cannae), is called scriba pontificis (22.57): but I do not think this is inconsistent with

probably the calator of the cippus in the forum—who summoned the people to the primeval proclamation of the divisions of the month²¹. This expression does not therefore conflict with the earlier traditions of the pontifical board: nor do I any longer think, as I formerly did, that the supposed existence of an original rex and pontifex minor is any indication of the original duality of tribes, to which reference has more than once been made, and of which there is plenty of other evidence (see § 6).

Rex always patrician. Whether as original King, as filling the temporary post of *interrex*, or in the curtailed dignity of *rex sacrorum*, the *rex* was regularly, to the end, patrician. This last at least is one of the institutions which Cicero pictures as disappearing, amongst others, with the suggested disappearance of the patrician order²². In the case not only of Servius—stated by Dionysius to have been originally plebeian—but also of the two foreigners, Numa and Tarquinius Priscus, an ennobling statute was required before admission to Royalty²³. As to the question of a later Marcius, a Plebeian, having been really a *rex sacrorum* in 210 B.C., see § 5, App. I. p. 184.

Republican appointment of Pontiffs. The appointment of Papirius above stated, p. 463, is made, after counsel taken by the Senate, under their direction, by the Pontiffs and Augurs²⁴ and cooptation, by either college, of a new member appears to be the general rule in the republic.

other functions. Cn. Flavius, Scriba, is spoken of in 304 B.c. as generally attendant on the aediles. (Livy, 9. 46.)

²¹ Above, § 14, p. 434. It is Macrobius (Sat. 1. 15. 10) who attributes the proclamation to the *pontifex minor*: Servius, ad Aen. 8. 654, to the *rex sacrificulus*.

²² Cicero, de domo, 14. 38.

²⁸ Dionysius, 4. 4.

This seems to me the more probable meaning of the words βουλόμενοι τοὺς ἰεροφάντας τε καὶ οἰωνομάντεις ἐκέλευσαν ἀποδείξαι τὸν ἐπιτηδειότατον τῶν πρεσβυτέρων κιτ.λ. (Dionys. 5. 1.)

In Livy, 27. 8 (269 B.C.) a flamen dialis is represented as selected by the pontifex maximus: but Mommsen suggests that the statement may possibly refer to his inauguratio being presided over by that officer²⁵. On the principle of ordinary election being excluded for divine office, see § 14, p. 431.

Effects of subordination to King. I have spoken above (§ 11) of the general development of Sovereignty, and the particular character of early Roman Law as based upon religious feeling, and probably formulated through pontifical judges (§ 14). I may now briefly state the *special* consequences of the connexion of the regal and pontifical office, and the subordination of the latter.

The more properly religious and ceremonial business—including the management of the Calendar—the introduction into high religious office and great part of the subject of family law—seems to have been left to the Pontiffs proper or their kindred colleges of the Flamens and Augurs. The direct administration of justice, on the other hand, whether criminal or civil belonged henceforth to the rex or his deputies.

Regal administration of justice. This subject is peculiarly important because, although there may have been leges, proclamations, having to all intents and purposes the same effect as the subsequent formal enactments by the people, it is at least as probable that the fragmentary passages, which have come down to us as Regiae leges, were memoranda of the pontifical board, only differing from the doom books of our Anglo-Saxon ancestors in that the latter appear to have been regularly issued as instructions for Courts of subordinate jurisdiction²⁶, whereas the former

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²⁵ Msr.³ ii. p. 7, n. 4. See, however, Tacitus, Ann. 4. 16, where the word legendo is in favour of the more natural interpretation of Livy, 27. 8.

²⁶ See Edward's Gesetze, i. pr. and ii. 5. pr. (Schmid, 2 pp. 111, 117).

were, either from public calamity or design, confined to the knowledge of officials, higher ecclesiastical or legal, who were long exclusively patrician²⁷.

The language of Dionysius as to the King's jurisdiction is sufficiently sweeping to cover all wrongs in the widest sense of the word and possibly though not so clearly, sins also.

Next, after purely religious duties, it was his function to maintain the laws and ancestral customs, to take thought for all right, natural or conventional, and of all wrongs to judge the greatest himself and entrust the lesser to the senators, providing thus against any irregularity in the suits. The last words are so obviously an anticipation of Republican practice that it seems unsafe to draw any conclusion from them as to any original division between the treatment of public and private wrongs ²⁸.

The cases of which we hear the most in the Regal period are capital charges. The sole treatment of these is imputed by Livy to an irregular piece of tyranny in Superbus²⁹, which seems to imply some rule or principle in practice of taking the opinion of a Council on such matters previously, as Tullus does that of the Senate before his action against the Alban traitor Mettius Fuffetius³⁰.

This suggested consilium Zumpt³¹ goes so far as to identify with that of the historical functionaries under the republic, which was, no doubt, what prompted the loose

²⁷ Sources, pp. 15, 16.

²⁸ Dionysius, 2. 14. έπειτα νόμων τε και πατρίων έθισμών φυλακήν ποιείσθαι και παντός τοῦ κατὰ φύσιν ἢ κατὰ συνθήκας δικαίου προνοεῖν τῶν τε ἐδικημάτων τὰ μέγιστα μέν αὐτόν δικάζειν τὰ δὲ ἐλάττονα τοῖς βουλευταϊς ἐπιτρέπειν προνοούμενον ἵνα μηδὲν γίγνηται περὶ τὰς δίκας πλημμελές. Pomponius, Dig. 1. 2. 2. 14 is equally general. Quod ad magistratus attinet initio civitatis hujus constat reges omnem potestatem habuisse. See Msr. i. p. 163.

²⁹ Livy, 1. 49. Cognitiones capitalium rerum sine consiliis per se solus

exercebat. To the same effect Dionysius, 4. 42. 2.

³⁰ Dionysius, 3. 26.

³¹ Zumpt, Criminalr. i. p. 123.

statements of prehistoric practice here cited. The consilium of the Kings and its consultation was more probably as purely facultative as that of the paterfamilias noted above (§ 3, p. 56): and it is apparently entirely optional to the King whether he allows an appeal³² from capital sentence.

No coordinate judicial authority. Some difficulty arises, at first sight, from the existence of other authorities, evidently very old, and appearing to have some independent judicial power. These will, however, be found on examination to be, or to have become, subordinates of the King.

Quaestores and duumviri. The persons in whom we might look, with the nearest approach to probability, for an independent or co-ordinate judicial authority, are the quaestores parricidii and duumviri perduellionis. Both shew some trace of the original duality of the populus, and the first pair in particular shews a remarkable utilisation. for general capital prosecution, of a primeval religious offence (see below, § 18, p. 592). Both pairs of officers were probably, in their origin, as old as the King. As distinguished, however, from their republican successors, the quaestors are represented to us as being not so much judges, or public prosecutors, as police, or rather detectives³³. They were clearly nominated by the King, after that functionary was established, though their nomination was perhaps confirmed by the people³⁴. Of the offence with which they dealt I shall speak under the head of regiae leges.

⁸² E. R. L. § 14.

⁸³ Mommsen, Hist. (Dickson, 1901), i. p. 191: E. R. L. p. 79: Msr.³ ii. pp. 542 sqq.

³⁴ Zumpt, i. p. 56. If there is any truth in the legend of a *lex curiata*, being preserved, for the confirmation of these officers' authority (Tacitus, Ann. 11. 22) this is apparently the origin of the *populi suffragia* spoken of by Junius Gracohanus, Ulpian, Dig. 1. 13. pr. and 1. But the passage of Tacitus is a mass of confusion (see E. R. L. § 17). Zumpt, l.c. relies on this alleged *lex curiata* as shewing that these were standing officers, not merely delegates of the King.

To a considerable extent the same remarks apply to the duumviri perduellionis, or occasional commissioners for trying perduellio on which also I must refer to the section on regiae leges. These commissioners are distinctly appointed by the King, in accordance with the somewhat apocryphal lex to be discussed in the same section. lex I take to be, in all probability, an extremely old pontifical record, referring, as has been said, to the original dual constitution of the populus, whether really ever embodied in a formal proclamation, or ordinance, or not. In the ingenious attempt of Donaldson to read this document into Saturnian metre, it will be found that the part relating to provocatio does not at all fit in, and I should think it was probably not part of the original³⁵. The vote of the people, as confirming the appointment, is even more questionable than in the case of the quaestores. The allowance of appeal I believe on the testimony, by implication, of Dionysius, and of most other authorities, to have been purely in the option of the King^{35a}.

Civil jurisdiction of King. The jurisdiction hitherto mentioned is criminal. In the matter of civil procedure also, to which reference has been briefly made above (n. 32) tradition represents the King as sole judge, deciding even those matters which, in late times, came before private persons as judices or arbitri³⁶. The "old Kings of Greece," with whom Numa is compared in this respect were, I presume, an ideal of the tribe leader of the heroic age, seen through the medium of some philosophic imagination³⁷, and

³⁵ See Donaldson's Varronianus³, p. 240. He reads it as in Livy with slight alterations of his own. For a suggested new version, see § 19, p. 596.

<sup>Bia Dionysius, 3. 22. See E. R. L. § 14 generally and Msr. ii. p. 11, n. 2.
Cicero, de rep. 5. 2. 3. The fragment is printed in E. R. L. p. 90, n. b.</sup>

³⁷ Grote (1888), ii. pp. 4 sqq. There may have been some mention of them in the (now) fragmentary beginning of Polybius, Book 6, which Cicero, we know, consulted (de rep. 1. 21. 34).

duties so engrossing are made by Cicero the ground for an endowment of Royalty with land cultivated at public charge.

This personal hearing of private suits is repeated by Dionysius, when he comes to contrast the beginning of the republic with the ancient practice, under which the King's decision was law38. The practice, however, of delegating minor cases to individual Senators is recognised from the beginning39 but the trivial dispute of the hinds, in hearing which Tarquinius Priscus meets his death, is still an instance of the comprehensive jurisdiction over the most minute affairs attributed to the early Kings⁴⁰. It is to Servius Tullius the Commons' King that, amongst much which cannot be merely anticipation of the early republic, we find 41 attributed the definite separation of private from public cases, and the reference of the former to private judges42. To the reputed Servian reform, however, and its many anticipations of republican practice I shall come later on. Upon the original conception of the Royal jurisdiction enough has been hies

King and Senate. It will not be necessary to add much about the special relations of the King with the Senate, to what has been said above on the general subject of the latter body, and its constitution as illustrated, *inter alia*, by its reported proceedings on an *interregnum*. The voluntary division of the Senate, by itself, into so many decuriae, for

³⁸ Dionysius, 10. 1. τὸ μὲν ἀρχαῖον οἱ βασιλεῖς αὐτῶν ἔταττον τοῖς δεομένοις τὰς δίκας, καὶ τὸ δικαιωθὲν ὑπ' ἐκείνων τοῦτο νόμος ῆν. The curious expression in the last words is apparently suggested by the jus esto of the Twelve Tables.

³⁹ Compare Dionysius as quoted in n. 28 with ib. 2. 29.

⁴⁰ Dionysius 3. 73 and Livy, 1. 40.

⁴¹ See E. R. L. p. 97.

⁴² Dionysius, 4. 25. ἐκεῦνος... δικαστάς. The last words seem almost an anticipation of the times of Gracchus and Cotta. But see Msr.³ ii. p. 229, quoting inter alia Servius' own speech, Dionysius, 4. 36.

this extremely artificial purpose, has been regarded as so improbable that I have dared to suggest some copying of the old arrangement of the tribe considered as a host (see § 6, p. 249 and § 8, pp. 286, 291).

With regard to its relation to the King, the Senate, as a whole, was to be consulted by him, passing a vote by majority⁴³. As this depended on the King's initiative^{43a} it must have been a nonentity during such a tyranny as that of Superbus. In the republic, on the contrary, this consultation became a real obligation upon the annual chief officers, who were thus, at least until the Licinian rogations, the mouthpiece of the Senate and much under its control44. Beside so substantial a difference, the King's power to fill occasional vacancies in the Senate is comparatively unimportant. The general administrative authority, which the Senate began to exercise towards the close of the republic. is a quite late growth, probably due in some degree to the absence of the chief magistrates in war. But their influence over the latter, as mere yearly officers, is an obvious fact from the beginning of the republican government.

Division into majores and minores. Whether this division practically meant anything more than some precedence in dignity we do not know. The reconciliation of the order of gentes majores and minores with an original Romulian division into three tribes and thirty curiae is so difficult, in the absence of any sufficient evidence, that I think the

⁴⁸ Dionysius, 2. 14. See § 8, pp. 288, 291.

⁴⁹a Dionysius, ib. περί παντός ότου αν είσηγήται βασιλεύς διαγινώσκευν τε και ψήφον επιφέρειν κ.τ.λ.

⁴⁴ Consul is according to the better derivation connected with consulere. See however Msr.³ ii. p. 77, n. 3. We may note Lydus' delicious anticipation of certain modern ministers ἀπὸ τοῦ κόνδερε...κόνσουλ ὁ κρυψίνους (de magg. 1. 30). The order of the names practor, judex, consul, is interesting and suggestive, though the wording of the old muster-summons, Varro, L.L. 6. 88, gives judex a priority.

hypothesis of a Tarquinian revision may be reasonably accepted in preference⁴⁵.

Complete Sovereignty attained in Tarquinian dy-Previous inchoate and partial developements have been described as absorbed or superseded by what is here considered as the first establishment of a complete Sovereignty, which is believed to coincide with the Tarquinian dynasty. The account of that dynasty I have ventured to regard as a true story—a drama ending in the revolution which is brought on by a tyranny perfectly historical on the whole, though containing individual acts of an extravagant and fabulous character. But the general tendency of the dynasty until its close, is to effect a reconciliation, or at least a blend of two discordant elements in the Roman Polity, possibly representing a racial difference which has been broadly represented as identifiable with that of Patrician and Plebeian. The attempt is certainly a compromise, which is partially to be traced in our scanty and doubtful traditions of the dealings of the Kings, notably the Tarquins, with the Senate and army. Part of these are no doubt anticipations of what can be proved to be historical practice of a later time and I fear I must confess to eking out what amount of contemporary truth may underlie them with much that merely consists of the conclusions of modern writers, or even occasionally of pure hypothesis.

In the former class I would place the closure of the circle of old *gentes*, which, as a general fact, has the support of Mommsen and some others; though I understand that great writer, whom I vouch as my authority, to date it later than I—i.e. at the beginning of the republic, on the occasion of the best authenticated addition to the patrician body, of

^{45 1} understand Mommsen, Msr. ³ iii. p. 868, n. 3, to suggest, first, an order of curiae divided into Tities, Ramnes, Luceres, in this priority, for the gentes majores; then the same order beginning again for the minores. For the preference of the Tities, see Msr. iii. p. 97.

the great Claudian family with their lands and retainers. He accepts apparently the vague date of Livy⁴⁶, a somewhat questionable authority, in the earlier times, for all matters connected with the Claudian and Valerian gentes^{46a}. I would rather connect the fact doubtfully indicated in Livy's story with my own hypothetical recasting of the whole Curiate system, and of the Senate itself as representing that system.

Original division or redistribution. I need not repeat the argument on the improbability either of an original morcellement, by the founder, of his little kingdom into thirty curiae, each containing so many gentes; or of the further self-division of the Senate, on his demise, into so many decuriae, for the extremely artificial scheme of an interregnum 47. The latter, which is continued into historical times, has been regarded as possibly copying some old arrangement of the tribe considered as a Host. For the former, a reconstitution, perhaps military, by the first real Sovereign, is infinitely more likely when we take into account the same person's historic "adulteration" of the original Council, by the addition of a third47a, and his doubling of the main military force, by the probable admission of Plebeians⁴⁸. The whole struggle, as I read it, is, in its main features, a contest of the King, aided by the plebeian or popular party against the old aristocracy.

This sovereignty a great power, requiring great concessions. In the new reading, which has been suggested, of the stories of Livy and Dionysius, the greatness

⁴⁶ Livy, 2. 16, 21. See however Mommsen, Forsch. i. p. 174, n. 11, on Livy, 4. 4. 7. Also Dionysius' account of the original defection of the Claudii to the Romans from Regillus (Dionysius, 5. 40). Whenever this really occurred, it is not unnatural that the transfugae should move across the Anio from their old countrymen. See Livy, 2. 16, on the vetus Claudia tribus, and generally § 16, App. III.

⁴⁷a Factio haud dubia regis, Livy, 1. 35.

⁴⁸ See above, n. 9 This was no doubt part also of the reform of Priscus.

of the power acquired must not be overlooked, nor must it be supposed a prize ready to drop, like a ripe plum, into the mouth of the first lucky adventurer. It is a complex and complete structure, only attained by considerable concessions, on the one hand to the aristocratic and on the whole the predominant party, on the other to the people.

On the tyranny and downfall of the dynasty, I have to speak later on: at present I confine myself to the evidences of the formation of a party, at any rate a body of "King's friends," by the first Tarquin, whom I take to have been a very able man, whether really of distant Greek origin—as his family distinctly copy the Solonian model—or a pure Etruscan.

The policy of Tarquinius. Besides his personal service he financed the military requirements of Ancus out of his own resources and possibly furnished the same assistance to the lesser houses whom he ultimately raised to the patriciate and the Senate, leaving the older families their original priority 48a.

This last point is one which requires some special notice. It is clear that the old Houses must have retained a vast amount of priestly and family privileges: otherwise they could not have recovered their ascendancy almost immediately on the establishment of a republic. On the other hand we must set the admission of the Plebeian to new circles of civil and military efficiency, from which he was formerly excluded; of this the increase of the Senate and the Army, and the whole of the Servian system are evidence. The result is a regular and uniform system, of which the arranged succession of the second Tarquinian prince is simply a part. On the tyranny and downfall of the third, as has

48a Dionysius, 3. 48, 67. It may be refining too much to see an intended contrast in Horace's "dives Tullus et Ancus" (Odd. 4. 7. 15): the epithet certainly seems somewhat "otiose." But see Orelli's note. On the general policy of Tarquinius, see too Livy, 1. 34: Cicero, de rep. 2. 20. 36, &c.

been suggested, I shall have a little to say at the end of the section.

That Tarquinius succeeded in ousting the heirs of Ancus, and in practically nominating his own adopted son as successor seems to be the undoubted result⁴⁹ although it is ultimately put down to the management of Tanaquil, a genuine heroine of old Roman or Etruscan romance⁵⁰.

Mommsen, who adheres, on the whole, to the Romulian legend, sees, in the details of Dionysius, a distinct foreshewing of the modern legislative system, with King, Lords and Commons complete. More clearly perceptible is an anticipation of the Republican mode of legislation; in one passage, indeed, we hear that towards the close of Servius' reign he was in the habit of summoning the centuries rather than the curiae for this purpose⁵¹. The form given by Gellius for arrogatio^{51a} is distinctly the rogatio for a republican lex. That of the testamentum comities calatis is not preserved.

Neither of these anticipations of republican or modern history seems necessary. The lex curiata of the kings has been satisfactorily explained by Mommsen himself as little more than a popular vote, or acclamation, of allegiance confirming a nomination already made elsewhere (§ 10, p. 368), most likely by the Senate, in whom resided the temporary guardianship of the State and the determination of the character of the government⁵². The traditional application of the same ceremony to other officers is extremely doubtful, although distinctly traced by Tacitus from the regal period⁵³.

⁴⁹ Cicero, de rep. 2. 20, 21, 35-38: Dionysius, 4. 3. 4.

⁵⁰ Dionysius, 4. 4: Livy, 1. 41. See § 2, pp. 42, 43. Servius was, of course, already in attendance, like the Tanaist in Irish Law (Ginnell, Brehon Laws, p. 68). To quote the words of his masterful mother-in-law (Dionysius, ib.): δνομα ξοται δ' οὐκ ἀκουσι Ῥωμαίοις ἀλλὰ βουλομένοις ὑπὸ σοῦ τὴν πόλιν ἐπιτροπεύεσθαι ὑφ' οὖ πολλάκις ήδη καὶ πρότερον ἐπετροπεύθη.

⁵¹ Dionysius, 4. 20. 51a Gellius, 5. 19. 9.

⁵² Msr.³ i. p. 213; ii. p. 8. See Livy, 1. 17 and above, § 10, p. 363.

But for the purpose of regal legislation no republican lex is necessary. Before the Tarquinian Sovereignty is established any formal legislation at all is extremely doubtful (§ 10, p. 382). The part of the comitia (curiata), even in the ceremonies of arrogatio and testamentum had, in republican times, long become a mere form (ib. p. 374), following, as of course, in the former instance the decision of the Pontifis; in the latter the mancipatory testament had superseded the older forms.

After the establishment of the Tarquinian dynasty, everything in the nature of law even as it seems to me, the Servian system itself (see § 16, pp. 536, 537), might well be carried in the form of ordinances, under the King's administrative power, which was clearly unlimited. If necessary to shape, or put into form, any previous pontifical memorandum, an ordinance to this effect was clearly within the original and proper signification of the term lex (proclamation or declaration)54, and this is very probably the form in which the so-called Regiae leges were ultimately drawn up. The story of the renewal of old "laws" and the addition of new ones, on contract and private wrong⁵⁵, even on the minute regulation of procedure, which appeared to be such a diminution of royal prerogative⁵⁶, is in no way intrinsically improbable, nor are their repeal by Superbus⁵⁷ and restoration by the first consuls58.

À propos of this last King and his τυραννίς I have a few words still to say on an old maxim of Sophocles ὕβρις φυτεύει τύραννον which is not incapable of a modern interpretation. The first and most natural meaning of these words has always appeared to me to be "It is the insolence (of an

⁵⁴ Jurisprudence, i. pp. 303-306.

⁵⁵ Dionysius, 4. 10, 13.

⁵⁶ id. 4. 25. ⁵⁷ id. 4. 43.

⁸⁸ καὶ γὰμ τοὺς νόμους τοὺς περὶ τῶν συμβολαίων τοὺς ὑπὸ Τυλλίου γραφέντας ...οῦς ἄπαντας κατέλυσε Ταρκυνίος ἀνενεώσαντο. Dionysius, 5. 2.

aristocracy) that produces the popular head." This is the regular history of the so-called Greek tyrannies⁵⁹. In the second phase-probably the more ordinary reading of Sophocles' saying—it is his own UBpis which developes the popular hero into the tyrant; the UBpis which is the inevitable result of unbridled and irresponsible power, which has seldom been better described than in the words of Otanes⁶⁰ one of the conspirators against the Magian. "Such a man" to vary slightly his vigorous exordium "tramples on all conventions; he violates the chastity of women; he puts men to death uncondemned." He may enjoy a long success. by the docility or subservience of his subjects: but a time must come when the blast of calamity will topple down the securest edifice, scattering alike sycophant and supporter. Then where will be the "hand unseen" to strew flowers upon his tomb, the tomb of the universal oppressor and wholesale murderer 61?

⁵⁹ Grote (1888), Pt II. ch. ix.

⁴⁰ Herodotus, 3. 80.

APPENDIX TO § 15

Corssen's theory of an original king, p. 477. Rex derivationally a somewhat general term, ib. Cognate forms and derivation according to Corssen, ib. 'Phylhaos, ib. Vedic ragán, &c. Teutonic reiks and raihts, the judge as straightener, 478. Keltic rig, ib. Improbability of early Regal subdivision or legislation, 479. The clan-leader first, the judge and Corssen's king later, 480.

The Roman word rex has, according to its Latin etymology—being undoubtedly connected with regere—so general and vague a meaning (see § 15, p. 456) that it might be consistent with any official position of authority. What specialisation of this general idea was intended when the name was first employed we can only guess from the traditions as to the predominating functions of the officer thus designated, which, on the whole, appears to me to have been the judicial, § 15, p. 457.

From an entirely different point of view we have now to consider the cognate philological forms on which Corssen bases his theory of a primeval King common to the Aryan races before their separation ⁶².

The Greek proper name ' $P_{\eta\gamma}i\lambda ao_{\gamma}^{63}$ is so obviously explicable on local grounds that we may dismiss it from our discussion without further consideration.

⁶² Corssen², i. pp. 451, 452.

⁶³ id. l.c. Curtius, p. 185, derives the word from 'Ρήγιον comparing 'Ασωπόλασς.

The case is different with the Vedic rāgán, Skt rajan, (cf. our Rajah), to be referred, as Curtius and Corssen both shew, to the root rag, whose original physical meaning is to straighten or stretch, from which we find other words in Sanskrit and the cognate Zend meaning not only locally direct but also morally right and true⁶⁴. The reference to the function of judge is obvious and, in fact, remarked by both the above named writers, though the general one of government seems rather to be preferred by Corssen. A cognate Teutonic root rik- has been assumed, from which come reiks Gothic for ruler, or prince, and raikts straight or right, &c.⁶⁵

I must admit that a good authority (Kluge, Etym. Wörterb.) in his article on *reich* treats this assumed root as a pre-teutonic loan word from "the equivalent Celtic *rig*⁶⁶." He does not however deny a primitive alliance with *regem* and Skt *rajan*. As to the Irish *rig* himself, the subject is too complicated and difficult to enter upon here. The author cited below admits *rig* to be cognate with the Latin *rex*.

erzu, gerade, recht, wahr: Corssen² prefers (p. 452) the general idea of leading and directing: both reject, as does also Skeat, any connexion with the root ráġ, glänzen. If I remember right the author of "Erewhon" calls judges straighteners. This is, of course, a mere romancer's fancy. It is a fact, however, that Don Pedro, King of Castille, whom we may compare in some respects with Tarquinius Superbus of Rome, was known to the more appreciative of his subjects not as the cruel but as El corregidor or the corrector.

⁶⁵ For reiks see Ulfilas, Matthew 9. 18: Reke is common in the Nibelungen Lied: compare too our English termination -ric and the adjective rich (Skeat, Eng. Etym.² i. pp. 129, 220); for the two meanings of raihts, see Mark 1. 3: Luke 3 4; 10. 28.

^{*6} Ri, genitive rig, is the old Irish name for the headman of a tuath (district or clan), of the smaller and greater unions of tuaths or of the entire kingdom. For the derivation of rig and its connexion with old Irish rigim, strecke aus, &c. see Curtius, p. 185. For the functions of the Rig, Ginnell's Brehon Laws, pp. 64—68.

At first sight these interesting etymologies seem not only to establish Corssen's theory, but in particular to connect the primeval King with the office of judge which is undoubtedly the function most immediately connected with and preceding the office here regarded as finally reached in the case of Tarquinius Priscus at Rome, though perhaps better exemplified in the prehistoric antiquities of Greece. This is probably the reason why Corssen so strongly presses the non-despotic character of his supposed primeval King.

Now I have already, in the particular case of Rome, pointed out the improbability of a Sovereign, such as the early Kings of Rome are represented⁶⁷, either parcelling his kingdom into districts, or, I may add, encumbering himself with laws at all 68. The traditions, if we may go so far as to call them traditions, of our historiographers, do, it is true, attribute both actions to their hero-founder, but they are not borne out by the evident survivals of an original dual State, or by the story, which I must consider as approaching to history, of Tarquinius Priscus and his successors. I shall speak further in the next two sections. With regard to the theory of Corssen as a statement of the Aryan beginnings generally we are naturally tempted, by the fact of Ireland being suggested as the possible source of a Gothic root, to look upon that country as an early instance of social developement. As a matter of fact most of our Irish records are comparatively late, and indicate a state of society which may have passed through many changes. There does not seem to be anything in this literature that can be compared with the Homeric and Hesiodic poems.

Among really original constituents of a state the first person exercising anything like general command appears, at least in our Western nations to be the War-chief: any civil organisation is of a vague and incoherent character.

⁶⁷ See § 1, p. 8.

⁶⁸ See P. J. pp. 147, 148.

The molecules are beginning to crystallise into the elements of a permanent law abiding society; but that is all we can say ⁶⁹. The immediate antecessor of the final and true King is, I believe, the Judge. Both in etymological sequence and in the genuine tradition of old popular song the clan-leader comes earlier still: but it is not till after some settlement, and some aggregation of themselves into larger units, by the individual members of the invading Host, that we can arrive at the law-administering Royalty of Corssen.

69 § 11, p. 396.

§ 16. THE SERVIAN SYSTEM

HISTORIC character, p. 481. Connection with Valerian Reform, 482. Primary object, 483. Equites, 484. Grades of infantry service, 485. Seniors and juniors, 486. Duicensus, 487. Classis or classes, 488. Assidui, proletarii, 489, Ennius, 490, Locuples, 491, Classes clipeatae, 494. Introduction of pay, 495. Change to manipular system, 497. Classes navales of columna rostrata, 498. Computation of qualifications in modern coinage, 499. An array, not an army, ib. Speech of Cato, 500. Roman aggression, ib. Registration, 501. Census, 502. Lustrum, 503. Quinto quoque anno, Gradual development of class system, 504. Plebeian ownership, &c., 506. Grundbesitz, 508. Absorption of old proletarii. 510. Hiatus between Dionysius and other writers, 511. tribes and Censui censendo, 512. Connexion with previous divisions? Original object, ib. Identification with curiae, 513, with pagi. έπτὰ πάγοι, 514. Dionysius and the Servian division, ib. Number of original tribes, 517. Their order and style, 518. Tributum, ib. Tribules and aerarii, 519. Timocratic majority retained, 520. Cicero, 521. Karlowa, Niebuhr, 522. General' remarks on powers of comitia, 523. Legio, ib. Supernumeraries, 524. Hastati and Rorarii, 525. Accensi, Velati, Velites, 527. Livy's armature, 528. Servius' supernumeraries, ib. Exploitation of the populace, 529. Occasions for draft on lower classes, 531. Volones, 534. Mode of actual enactment, 536. Other reforms attributed to Servius. ib. His end, 537. Seeley's difficulty as to centuriate voting, 539. Conclusion, 540. Appendices. I. Proportions of class fortunes, 542; II. Res mancipi, 544; III. The Claudian tribe and early republican history, 556.

Historic character. In the first beginnings of Rome we have recognised the union of two racial elements not materially differing from one another, although by no means in perfect accord, and the endeavour to weld them together by a third incoming element, which is certainly connected with the establishment of a common Sovereignty over all.

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While we cannot accept the objectless parcelling out of his original kingdom by a fabulous founder, we see traces of an old artificial arrangement of self-formed associations—the curiae and gentes—which seem to have been in part suggested by the primal military marshalling of an invading Host, in part the result of a symmetrical reorganisation. This is the stage which I assume to be reached in the first establishment of the Tarquinian dynasty, and which must be admitted to be mainly hypothetical. At the second stage, which I have now reached, there is reason to believe in an actual recasting of the entire Roman Polity, by a member of the same dynasty.

I have no hesitation in accepting Servius as a real personage. Here, as elsewhere in early history, it does not appear to me that the admixture of fabulous elements into the story of an individual necessarily deprives that story of all credence, if a reasonable object is suggested for the action attributed to him and there is nothing intrinsically improbable in such action.

It does not appear to me to be an absolutely ascertained matter, or a question of much importance, whether the time-honoured heroes of earlier Roman legend ever existed or no. It is quite possible to believe in the early attempts at appeal from capital sentence without dating them by the reign of Tullus, nor do the quaestores parricidii require the name of Romulus or Ancus to back their intrinsic antiquity, and, with regard to the present case, whether we believe, as I am inclined to do, in a personal Servius or not, we cannot but see, in what is attributed to him, a pre-republican reform, as to the general facts of which there is no doubt.

Connexion with the Valerian reform. There are indications, in the story told of the last two reigns by Livy and Dionysius, that we must consider the establishment

of the consular government as only the later act in a long drama, of which the reform attributed to Servius is the first. This view is taken, perhaps rather too strongly, by Mommsen, in his History and the later Staatsrecht. Certain considerations are also drawn from the undoubtedly early establishment of the plebeian tribunate. Other historians (e.g. Seeley) go much further and read together with their accounts of the Servian system the developments which it ultimately received, such as that to which Livy calls attention.

Now we must, as it seems to me, be on our guard against the confusion, by our Roman authorities, of the national assembly, which may really be referred to the scheme of Servius, with the reformed condition of it, the comitia centuriata, which they had before their eyes, as well as with the earlier form of it, the comitia curiata, of which they knew by tradition and antiquarian practice alone.

I am therefore disposed to retain the order of time, and to confine myself at present to what I conceive to have been the gist of the Servian constitution in its original conception. This seems to require some consideration of the class and century arrangement, although the complete working out of that arrangement is to be attributed to a later period, beginning perhaps not much later than the beginning of the republic itself and lasting down to the Second Punic War.

Primary object of the system. The development of the Servian system into a political assembly is so early that our Roman authorities treat its voting functions as coeval with its institution. There is however good reason for considering the primary object of the system to have been

¹ Livy, 1. 43. The completion of the number of the tribes was in 241 B.C., but the connexion of the tribes and centuries is supposed to be earlier, possibly resulting from the reforms of Ap. Claudius Caecus.

the welding together of the patrician and plebeian element into one body, graded on the basis of property rather than birth or family connexion, and organised directly with a view to military service: this being made roughly proportionate to a register and assessment of persons enjoying civic rights, and their property².

Whatever may have been the truth as to the occasional recognition of plebeian gentes, or their admission into the Curiate system, it is clear that much question attaches to any political competence of a plebeian member even of a double gens, and very much more to a Plebeian who was not a member of a recognised gens at all. And any consequent disqualification would naturally apply not only to rights but to important obligations also, notably that of military service³. This last I take to have been one of the main reasons for the Servian organisation, which rendered all owners of a certain amount of property, as such, liable to service, and, at the same time, gave to them certain independent political rights.

Equites. This system had, at its head, a body of cavalry, which, in some form, existed before, but of which we have but little information that can be depended upon⁴. They were henceforth persons of the first rank (whether distinctly reckoned as part of the first class is doubtful), and of distinguished though not exclusively patrician family.

But the infantry composed the main body of the persons now registered for military and fiscal purposes. They were, at some later period, according to Mommsen, classed in five

⁴ See above, § 8, p. 285, and generally Msr. iii. pp. 255—259. On the question of admission of Plebeians into the original sex suffragia, Seeley², pp. 79, 80. Into the later questions of the qualifications, and functions of the imperial equitatus I need not enter here.

divisions⁵, although the actual name *classis* was originally applied only to one. It is from this limitation of *classis*, that the term *classic* is used of a first-rate author, a use of the word as old as the time of Gellius⁶ or Fronto.

The grades of service and armature and the probable scale of means in the theoretical Servian classes have been, particularly the latter, a fruitful, though not very profitable, subject of modern discussion. The former may be briefly dismissed here. The latter form more properly the subject of an appendix, as they involve a consideration of certain modern estimates.

The classes were according to our accounts? subject to military service varying according to their property. The rich furnish the cavalry and the heavy armed foot, the so-called phalanx. The gradual diminution of armature is a good deal superseded by the general adoption, in 406 B.C., of the scutum, or oblong shield, instead of the earlier clipeus, see pp. 494 sqq. This does not agree with the class system of Dionysius who gives the oblong shield to the second class, retaining the target $(i \sigma \pi)$; $A \rho \gamma o \lambda \iota \kappa \dot{\eta}$ for the first. Otherwise the armature gradually decreases down to the fourth class. The fifth are distinctly represented as serving as supernumeraries with javelins and slings. In Livy too the substantial part of the whole body consists of the second to the fourth class; the fifth are here furnished simply with

⁵ Msr.³ iii. p. 262: Livy, l. 42, 43. Dionysius makes six classes, the last consisting of the one century of $\tilde{a}\pi o\rho o\iota$, Livy's reliqua multitudo immunis militia. Dionysius, 4. 19, 20.

⁶ Gellius, 19. 8. 15. For the expressions, with regard to the census, of classicus and infra classem see the speech of Cato quoted id. 6. 13. See below, p. 500.

⁷ Livy, 1. 43: Dionysius, 4. 17. The supernumeraries Schwegler (Gesch. pp. 740 to 750) considers to have been drawn all along from the *proletarii*. They were probably anyhow of the lowest qualifying property.

⁸ Dionysius says (4. 19) speaking both as to service and δαπάνη, τὸ ἐκ τῆς τιμήσεως ἐπίβαλλον ἐκάστω διάφορον ἄπαντας ἐκέλευσεν εἰσφέρειν.

⁹ Dionysius, 4. 16, 17.

slings and stones¹⁰. Allowing for some minor differences, the general plan of the army, thus conceived, corresponds very closely with the legion of Polybius. The first class holding the $\chi \dot{\omega} \rho a \pi \rho o a \gamma \omega \nu i \xi o \mu \dot{\epsilon} \nu \eta$ are the rorarii¹¹ who commence the engagement¹². The second, third and fourth classes obviously constitute the strength of the host and may be identified with the $\phi a \lambda a \gamma \gamma i \tau a \iota$. The $\psi \iota \lambda o i$ in attendance on them are, I think, the javelin men and slingers¹³.

It must be admitted that the anticipations of later practice, or its reverberations in ancient legend, hitherto suggested, are somewhat faint and doubtful. The following case seems to me more decided.

Seniors and juniors. I speak of the well-known distinction in point of age, which is clearly referred to by Polybius¹⁴ and is relied upon by Livy, as one of the main reasons for the irreconcileability of the modern with the ancient system¹⁵. As there is hardly any question of garrisoning¹⁶ Rome, from the time of Porsena and the apocryphal battle of the lake Regillus (see below, pp. 559 sqq.)—at any rate from the Gallic conflagration of 390 B.C.—down to the dark days after Cannae, we might feel inclined, at first sight, to regard the latter calamity as possibly suggesting the original division attributed to Servius. But the evidence connecting the reformed version of the Servian constitution with the work of Appius' censorship is almost conclusive, as will appear from the later part of the above article. The occasions on which a garrison might have

είς πόλεμον έξιούσης ὑπομένοντας έν τῆ πόλει τὰ έντὸς τείχους φυλάττειν.

¹⁰ Livy, 1. 43.

¹¹ Dionysius 4. 16: Varro, L. L. 7. 58. rorarii dicti ab rore qui bellum committebant ante, ideo quod antea rorat quam pluit.

¹² There does not appear to be anything exactly corresponding to them in Polybius. But see p. 524.

 ¹³ Dionysius, 4. 17, 18.
 14 Polybius, 6. 19. 2.
 15 Livy, 1. 43.
 16 Dionysius, 4. 16. τετταράκοντα μὲν ἐποίησε νεωτέρων λόχους οἶς τὰς ὑπαιθρίους ἀπέδωκε στρατείας τετταράκοντα δὲ πρεσβυτέρων οὖς ἔδει τῆς νεότητος

saved Rome, though cataclysmic, are few. The raid of Ap. Herdonius, 460, the fire of 390, the menace of Hannibal, 216¹⁷, are the principal occasions which occur to one, when a standing army might have done good service. But it is not so much the paucity of these as the modern character of the artifice suggested by Seeley to meet the obvious disadvantage of enrolling the seniors, that weighs with me. We may perhaps therefore be justified in crediting this reputed institution of Servius, partly to Dionysius' reading of Fabius Pictor, one of his numerous blunders¹⁸, partly to a rather inexplicable institution of his own day, of which I have now to speak.

It was very well pointed out by Seeley¹⁹ that most of the younger men in active service would be *filiifamilias*, therefore in power and possessing no property of their own. "If therefore they were admitted (to Servius' registration) the money (or land) qualification was not regarded: if they were excluded, the best soldiers must have been excluded from the army." A passage quoted by Lange²⁰ from the later and inferior part of Festus²¹ appears to give the best solution of this difficulty and perhaps to account for the stories told by Dionysius, &c., of this reputed old division²². The father was allowed to register a son together with himself under the title Duicensus. The quotation of Mommsen

¹⁷ See Ennius, quoted below, p. 490.

¹⁸ Msr.³ ii. p. 283, n. l. On the age division note the silence or contrary testimony of Livy. Seeley², p. 86.

¹⁹ Seeley, p. 84.

²⁰ Lange, Alterthümer³, i. p. 466.

²¹ Festus P. p. 66. Duicensus dicebatur cum altero, id est cum filio census.

²² Dionysius, l.c.: Gellius, 10. 28. Tubero in historiarum primo scripsit Servium Tullium regem populi Romani cum illas quinque classes seniorum et juniorum census faciendi gratia institueret pueros esse existimasse qui minores essent annis septem decem atque inde ab anno septimo decimo... milites scripsisse eosque ad annum quadragesimum sextum "juniores" supraque eum annum "seniores" appellasse.

(Msr. ii. p. 365. n. 1) from Dionysius, 5. 75, is not in point, but the passage cited from Gellius (5. 19. 16) is held by Lange to prove that such a son had the power of voting although the voting of father and son in separate tribes is censured as irregular. Another passage would seem to shew that enrolment as a citizen on attaining maturity, was a practice with gentes in general²³.

As to those not in power, they were entered in a separate list as orbi or orbae²⁴. There is no evidence that this entry and vote of the son gave him any right to the property or constituted any restriction upon his father's power as Muirhead appears to suggest in his general remarks upon the succession to property²⁵. But it is just possible that the peculium castrense may have originated in this entry on the census roll. In the case of manumissus censu the slave entered himself, by his master's order, on the list with a return of his property, which must have necessitated a donation, of the peculium or otherwise. How soon this mode of manumission began we know not. Ulpian²⁶ says that it was "olim." Cicero, that a disputed point upon it arose ex jure civili²⁷.

Classis or Classes. As to the derivation of this difficult word philologers are not unanimous. Quinctilian derived it at once from calare. Moderns question whether it is a loanword from Dorian Greek, or of pure Latin origin²⁸ but are

²³ Festus, P. p. 108, *Improlus*. I am bound to say that a more natural meaning of the word (άγονος) is suggested in Müller's note from Gloss. Lab.

²⁴ Msr.³ ii. pp. 365, 366. See Livy, 3. 3.

²⁵ Muirhead², pp. 37, 42. See above § 3, p. 62; § 4, p. 113.

²⁶ Ulp. 1. 8.

²⁷ Cicero, de Oratore, 1. 40. 183, apparently he means that this was merely a question of old customary law.

³⁸ Quinctilian, 1. 6. 33: cf. Varro, L. L. 5. 91. Dionysius (4. 18) is in favour of a loanword, Mommsen (iii. p. 262. n. 1) of an Italian origin. Corssen² (i. p. 497*) protests against deriving from the Greek, but is obliged to invent or assume a Latin suffix to support his own view. See also Curtius⁵, p. 139.

fairly agreed as to its meaning-the calling out or summons, from which to the body summoned, the "levy," is an easy step. There are expressions and quotations in Mommsen from which one might hastily conclude that the division into five classes did not take place until the time of Cato Major29: but this cannot be that author's intention. Apart from the fact that any such late date would practically nullify the calculations of Livy, Dionysius, and Cicero, there is sufficient evidence of the action of the populus, as an organised political assembly, at an undoubtedly earlier period. But that the so-called division cannot have dated from the time of Servius is obvious. It seems to be a gradual process, resulting from the calling out of successive levies, on a decreasing scale of fortunes, as they were required by the needs of Rome, see p. 531. The occasions of these levies can, in fact, be approximately dated in several instances. Whether they are to be considered as ended by the time of the reforms of Appius, 312-304 B.C., or 150 years later (the time of Polybius), it is rather to the former epoch that we must refer the modern form of the Roman Constitution and a rough settlement of the classes. Of the previous stages of developement I propose to give a brief sketch, enquiring particularly into the early existence of singular or plural classes.

The first evidence is that of a time-honoured Code which, though fragmentary was until recently received without question. The main original division of the infantry—in fact of the people generally—was obviously that recognised by the Twelve Tables into assidui and proletarii—the former are generally taken to be the owners or occupiers of land, the latter those who were merely recognised as capable of supplementing the population. The former were liable to military service, the latter were free, so we are told by Dionysius, from either service or taxation. They are dis-

²⁹ Lex Voconia, 168 B.C.

tinguished in the Twelve Tables by the rule that in the one case only an assiduus could become bail for the appearance of an assiduus in court, or surety for his performance of a civil judgement, while any one could be bail for a proletarius30. For our present purpose the question is not this particular legal consequence but the general distinction, no doubt existing prior to the Decemviral legislation of assiduus and proletarius. That the proletarii are to be identified with the citizens below the fifth class, when the classes are established, appears from the immunity from service which it is directly stated that those citizens enjoyed31, and is to be inferred from such passages as that in which the poet Ennius speaks of their special arming for a particular occa-They were persons reckoned merely by their power of producing children, not having the lowest amount of property for a class, reckoned in Cicero's time, at 1500 asses; while the capite censi were so called as reckoned by their personality alone, although they might really possess as much as 375: below that a man probably did not appear on the census at all³². The poet evidently treats the equipment of the proletarii as an innovation due to the special emergency of which he is speaking-probably that crisis in Roman history, the few days after the battle of Cannae, when Hannibal made il gran rifiuto33. That occasion would

Proletarius publicitus scutisque feroque ornatur ferro: muros urbemque forumque excubiis curant.

For the history, Livy, 21. 51, 55.

⁸⁰ Gellius, 16. 10. 5. Nam Ennius verbum hoc ex duodecim tabulis vestris accepit, in quibus, si recte commemini, ita scriptum est adsiduo vindex adsiduus esto, proletario jam civi cui quis volet vindex esto.

⁸¹ It is at least said of those whom Dionysius calls of πένητες. See Livy, 1. 43: Dionysius. 4. 20.

³² Dionysius, 4. 10, 11, 13: see too Nonius, pp. 67, 155.

³⁸ For the quotation see Gellius, 16. 10. 1. legebatur...Enni liber ex annalibus: in eo libro versus hi fuere.

probably suit the "great service to the city" of which Cicero³⁴ speaks as arising from the brigading of a centuria of fabri tignarii with the prima classis. Anyhow we may take it as clear that in the time of Ennius himself, the friend of Scipio, the proletarius was still not liable for military service. On the other hand the assiduus did serve and originally as we know³⁵ at his own expense.

I do not for the present propose to go into the question of the alleged minimum fortunes. The derivation of the word assiduus by Festus is of course absurd³⁶, but serves to record the old tradition of militia service. The moral idea of assiduity in any function is clearly secondary, springing from that of attention³⁷.

The old derivation ab asse dando is repeated by an author named Aelius, quoted by Cicero, who gives at the same time the interesting equation assiduus = locuples, which may indicate what, I think, is now somewhat generally accepted as the true explanation³⁸ of the former word³⁹. Such an idea may of course have been suggested by an obvious derivation: but there are, by the side of this, some traditions as to the true meaning of the word assiduus.

³⁴ Cicero, de rep. ii. 22. 39: see Livy, 1. 43: Gellius, 16. 10. 10.

³⁵ Festus, P. p. 9. Assiduus...alii eum qui sumptu proprio militabat, ab asse dando vocatum existimabant.

³⁶ It is accepted, however, by Puchta, who takes the assiduus to be the man who furnishes the expenses of equipment to his poorer neighbour. The proletarii are according to Puchta, Instt. (§ 48, n. i) the proboletarii (vorgeschobene) the skirmishers, or prolectarii (des Hervorziehens Gewärtige) the attendants on the vanguard.

⁸⁷ As to when the soldiers began to receive pay de publico, see p. 495.

³⁸ Festus, l.c. and Gellius, 16. 10. 15

³⁹ Cicero, Topica, 2. 10. Cum lex assiduo vindicem assiduum esse jubet, locupletem jubet esse locupleti; is est enim assiduus, ut ait Aelius, appellatus ab asse dando. By locuples Aelius evidently meant merely substantial. He is most likely the Aelius of the Tripertia (Pomponius, Dig. 1. 2. 38), but may be L. Aelius Stilo, an antiquarian rather than jurist, who came 100 years later than Sextus Aelius Catus (Sources, pp. 22, 68).

Gaius, who explains locuples as a word from the text of the XII, defines him as one who has enough means to meet the claims of the plaintiff⁴⁰. Other renderings of the word by Pliny, Cicero, &c., are varied and fanciful, but point generally to the possession of land41. Such an idea may, of course, have been suggested by an obvious derivation but has been questioned. Mommsen objects, with some justice, to the above etymological explanation of locuples, and prefers to regard the assiduus rather as the substantial person, who serves at his own expense, sumptu proprio, than as the resident or settled (ansässig) land occupier42. The latter meaning, which is accepted by Karlowa43 and, in his previous writings, by Mommsen himself, seems to me preferable, and not only more suitable to the explanation which Festus gives of the metaphorical signification of assiduus44, but expressive of an important fact. The possession of land (not necessarily its ownership) was rightly regarded by Mommsen in his earlier work as the fundamental condition of citizenship, political privilege and the right and duty of national service. The question why the registration of land in a tribe was continued after the counter reform of Fabius need not here be considered. The original physical meaning of the same verbal root appears in possessio45.

⁴⁰ Gaius, lib. 2 ad l. xii. Dig. 50. 16. 234. l. Locuples est qui satis idonee habet pro magnitudine rei quam actor restituendam esse petit.

⁴¹ Paulus, Dig. 2. 6. 1. Edicto cavetur ut fidejussor judici sistendi causa datus pro rei qualitate locuples datur. Rei however may mean adversarii. Pliny, H. N. 18. 3. 11. locupletes dioebant loci, i.e. agri plenos: Cicero, de rep. 2. 9. 16. tum erat res in pecore et locorum possessionibus, ex quo pecuniosi et locupletes vocabantur. Festus, P. p. 119. Locupletes locorum multorum domini: P. Nigidius Figulus (Praetor, 58 B.C.) ap. Gell. 10. 5. 2. locupletem...qui pleraque loca hoc est qui multas possessiones teneret.

⁴² Msr.³ iii. p. 237, n. 4; p. 238, n. 4; p. 297, n. 3.

⁴³ Karlowa, RRg. i. p. 69.

⁴⁴ Festus, P. p. 9, s.v. qui in ea re, quam frequenter agit, quasi consedisse videtur. See too Gellius, 16. 10. 15.

⁴⁵ If this difficult word really means a "squatting" in advance of, or

This comparison with *possideo* and *possessio* unavoidably raises the question whether there was, in the Servian assessment, any qualification recognised by *possession* of land, as distinguished from ownership.

I agree with Mommsen that the qualifications were most probably originally expressed in land⁴⁶: but differ from him in regarding them as multiples of a true Roman minimum, rather than fractions of a supposed Romano-Teutonic maximum, see Appendix 1. As to the sufficiency of the former for a frugal Roman household I have spoken elsewhere (see p. 216): the latter is inferred by Mommsen (not without probability) from the Roman grants of land to the Claudii, on their joining forces with the Roman side (see Appendix III)—i.e. to the leader twenty-five, to the private man the traditional two acres⁴⁷.

The next piece of evidence, on the other hand, is in favour of an early plurality of classes. It consists of a phrase preserved by Festus⁴⁸—not it is true—in the most genuine text of his lexicon—evidently taken from an old poem. It may, in fact, come from Naevius' work on the first Punic war. Naevius died some time after 260 B.C. 49 The words appear to

in proximity to, an original holding (see Roby, Grammar, ii. § 2042, and Skeat, Etym. Dict., s.v. Possess) it seems to indicate an original distribution in fee (as we should say) followed by an encroachment on common land. See Msr.³ iii. p. 244, n. 4, and ib. p. 182, n. 1.

46 ? Intended to be permanent. The so-called lex Aemilia is, of course, entitled to the name of lex, but it is of questionable early date, 434 g.c., is due to a somewhat apocryphal dictator, and does not appear to have been followed in practice, although the censorship was specially revived after many years' disuse (see Livy, 4. 8).

⁴⁷ Plutarch, Popl. 21. It, or at least the higher amount, does not quite suit Mommsen's view, for which discrepancy he apologises, Msr. iii. p. 248, n. 2.

⁴⁹ Festus, P. p. 56. Classes clypeatas, quos nunc exercitus vocamus. Exercitus, a much disputed word, probably means the force which was kept out (of the city), either under arms for service, or under canvas, in the campus, for exercise. The comitia centuriata, as an exercitus, must, we know, be held outside the city (Gellius, 15. 27. 5).

49 Cicero, Brutus, 15. 60. Teuffel (Warr), i. p. 131.

refer to the alleged original armature of the first class—the clipeus or round target⁵⁰ translated by Dionysius ἀσπὶς ᾿Αργολική, which had been superseded by the scutum, the θυρεός or long hoplite's shield after 406 B.C. or whatever was the true date of the introduction of regular pay to the soldiers⁵¹. If furnished with a spike, this might serve, on occasion, as an offensive weapon⁵², but for regular warfare its bearer would stand at a disadvantage compared with the ultimate heavy armed legionary, like the Highlander with his target and claymore as against the grenadier or the earlier man-atarms. The puzzle of classes clipeatae lies in the connexion of plural classes with the clipeus, which, we are expressly told, was the peculiar armature of the first alone.

In classes clipeatae, of which the poet speaks, the word seems to be used in the general sense of forces: if taken literally it is an argument for the existence of more classes than one at the time when the poem was written, or of which it speaks. But it is a suspicious piece of evidence. If a record of actual fact, it must have preceded the time when the Romans exchanged their old armature of "lance and targe" for the long scutum of the heavy-armed hoplite. This change took place, Livy tells us, after the Romans began to receive pay for their service, which the same author puts at 406 B.C.⁵³ They had hitherto served, as a body of militia, at their own expense. This change of armature was also according to Livy⁵⁴ the epoch of the introduc-

⁵⁰ Festus, P. p. 56, s.v.

⁵¹ Dionysius, 4. 16: Livy, 8. 8: see too above, p. 491.

 $^{^{52}}$ I have no authority for the spike, except a suggestion of the possible original meaning of $d\sigma\pi is$. Even the rounded umbo, or boss, of the later scutum seems to have been, on occasion, capable of a similar offensive use, Livy, 4. 19; 30. 34.

⁵³ Livy, 8. 8. See too 4. 58, 59. Polybius, 6. 25. 5, 7, notes a certain change of armature in the cavalry, but not the introduction of pay.

⁵⁴ One would have expected both the phalanx and the Greek shield to date from a later period, i.e. the conflict with Pyrrhus. The Romans

tion of the manipular system, which now superseded the old phalanx. What I wish to point out is that previous to the important battle of Vesuvius and this practical revolution in the Roman military system there would appear to have been at least two levies called out, of persons previously immune, affording material for two distinct classes.

There appear to be two modes of explaining these classes clipeatae. The one is (I admit it is a hardy suggestion) to assume that a poet, writing about a war in which he had been personally engaged, the first Punic war, anticipates a system of levies not completed, probably, till the second, and yet elects to describe some part of the force, of which he is speaking, by its connexion with an armature which ceased to exist nearly two hundred years before his time. It is not as if the "targetted array" had been retained for part of the legionary forces. The hastati, where perhaps one might have expected it, were, we are told by Polybius⁵⁵, armed with the panoply, including the large scutum. To attribute to them the armature of their ancestors is an antiquarianism which one might expect in a pseudo-historian, like Scott, but scarcely in a matter-of-fact Roman. And yet I cannot think of any solution which so nearly answers the questions raised by the puzzling expression at the head of this paragraph; unless indeed we throw overboard Cato and Gellius-in themselves by no means easy of explanation nor particularly probable. There however I leave the matter.

The other suggestion which I have to offer is boldly to question the early date at which Livy places the introduction of pay, the change of armature, and the commencement of the manipular system generally. The introduction of throughout acted on the principle fas est ab hoste doceri. But Livy is very particular in his description of the manipular system (8.8), though it does not appear to have much to do with the battle.

⁵⁵ Polybius, 6. 23. 1, 2. But see below, p. 526.

regular pay is naturally connected with the change to a more substantial equipment as well as the development of specifically divided grades of service, if not of corresponding grades of political weight. The statement in Livy about the drawing of pay⁵⁶, is according to Mommsen⁵⁷ "well accredited": the whole story looks to me like a purely gratuitous concession not at all resembling the usual conduct of the patres towards the commonalty. Mommsen does not support his opinion by any references and I can find nothing in any of the ordinary sources. The notes in Festus would appear to connect stipendium with stamped or coined money⁵⁸ which will suit the time of Pyrrhus.

In his account of the first issue of military pay, Mommsen ignores the latter part of Livy's statement, i.e. that the soldier had previously to serve at his own cost⁵⁹, suggesting that in previous times the soldier could recover, and that the change attributed to 406 was merely that he was now to be paid directly out of the aerarium⁶⁰. But it was probably by no means indifferent (gleichgültig) to the soldier whether he was paid in cash or became a state creditor. The popular gratitude expressed in Livy, 4. 60, would scarcely have been provoked by the latter.

I conclude therefore that the expression classes clipeatae may be the recollection of a time shortly before 270 B.C., when it is quite possible that there may have already been more than one draft upon the persons originally immune from service.

The expression in classe procincta, although very old, does not appear to me to prove anything as to the plurality or otherwise of the early levies.

Of course the suggestion of a later date than the traditional one for the introduction of pay involves, amongst

Livy, 4. 60.
 Festus, F. p. 297, Stipem.
 Msr.³ iii. p. 109.
 Livy, 4. 59.

⁶⁰ See Msr. iii. pp. 1098 and 1129: Gaius, 4. 27: Livy, 1. 43.

other chronological difficulties, the postponement of Livy's introduction of the manipular system, which he rather drags in by the head and shoulders, about 337 B.C.⁶¹ The present seems a fair opportunity for a few remarks upon the character of this particular change which seems to me an obvious consequence of the invasion of Pyrrhus.

Without going further into the detail of the legion, we see at a glance the two great advantages of the manipular system, i.e. 1, Flexibility, 2, Independent action and increased responsibility. As to the first point, I think it enough to quote the words of Macaulay on the encounter with Pyrrhus: "The legion had broken the Macedonian phalanx, even the elephants, when the surprise produced by their first appearance was over, could cause no disorder in the steady yet flexible battalions of Rome" (Preface to the "Prophecy of Capys"). In fact there is great reason, in spite of Livy's elaborate detail (3.8), to connect the change in the Roman military arrangement directly with the invasion of Pyrrhus and to date it by the first, or rather perhaps the second, battle with that prince, 275 B.C. As to the second, each manipulus, or double century, was separated from the others by a certain space, through which the hastati, or principes, if unsuccessful, retired. Individual action, therefore, was possible to the manipulus. In the sequel, they closed up and the substantial part of the legion became, as before, a phalanx or solid column.

There is, we must admit, something theatrical and unreal about the successive advance, and calculated retreat of two bodies, each numerically double of what was considered to be the main strength of the legion⁶². But Polybius (presumably an eyewitness) is very explicit, and he is borne out, on the whole, by the sketch of Livy in Book 8. The most

⁶¹ Livy, 8. 8.

⁶² Polybius, 6, 21. 9.

probable point in the latter is a statement that a reserve consisting in part of rorarii, apparently including both hastati and principes, probably somewhat demoralised by their repulse, is the body the least to be trusted63 and so left in the rear

Phalanx, whatever the word may exactly mean, designates a very old-perhaps we might say the natural or instinctive-formation of a Host⁶⁴. Against the light armed orientals it was, in Alexander's time, invariably successful, owing, a good deal, to the enormous length of the sarissa, a special Macedonian developement⁶⁵. In the earlier Roman form, however, without this particular advantage, it must still have been heavy and difficult of manoeuvring, but it doubtless became the strength of the final legion, the triarii66. The advantages of the manipular system have been already referred to as also its success in actual experience in a contest with one undoubtedly of the best representatives of the Greek system.

Classes navales primus ornaret. If we accept the authority of the much-amended inscription on the columna rostrata we must believe that the classes navales which Duilius was the first to equip had already, in the first Punic war, familiarised this word, at least in the general sense of forces. But the inscription in question is probably a reproduction of reproductions. On this piece of evidence I do not, therefore, place much reliance.

On the first essay of the Romans in maritime warfare see Polybius, 1. 20; on the despatch with which the fleet was prepared Pliny, 16. 192, and Florus, 1. 18. 7. As to how the word classis got the special meaning of fleet Mommsen

⁶³ Livy, 8. 8, but this may be only said of the accensi.

⁶⁴ Homer, Il. 6. 6.

<sup>See Grote (1888), x. p. 8: Polybius, 18. 12. 2.
Polybius, 6. 21. 7. They were always 600, ib. 10.</sup>

rather oracularly says In der Beziehung auf dem Seekrieg hat Classis seine ursprüngliche Bedeutung behauptet⁶⁷.

Computation in modern coinage. For the completion of the reputed Servian system, reckoned in money, which was not original (see pp. 493, 508 sqq.), I would here suggest a terminus ad quem. It cannot apparently have commenced earlier than the reduction of the Roman coinage, which is generally dated, on the authority of Pliny⁶⁸ in 265 B.C., as the amounts of the class qualification are expressed in the reduced coinage. As to the absolute value of the assumed minimum of land (2 jugera) I have spoken elsewhere (p. 216).

The Servian exercitus must I think be regarded as rather for muster or array than for actual service in the field. This appears to be conclusively proved by the trumpeters and hornblowers being attached, as a body, to one particular class instead of being distributed over the whole army. Nor can the armourers have been permanently brigaded, for service, with the first or second class⁶⁹. In fact these linkings, on which our authorities are much divided, are attempts to explain the political superiority of the wealthier classes in the comitia centuriata by ingenious numerical calculations⁷⁰.

In speaking of the Servian exercitus as an array or muster, not an army, I must not be misunderstood. The phalanx is

⁶⁷ Msr. 3 iii. p. 263, n. 1.

⁶³ Pliny, H. N. 33. 46. Mr Hill, of the British Museum, supposes (Historical Roman Coins, p. 23) this transformation (which it is, rather than a reduction) to have occupied a considerable period, probably beginning 286 B.c. Some of the so-called "bricks," or ingots, belonging to this period, are undoubtedly connected with the invasion of Pyrrhus. The reform of the Campanian mint may date indeed from the censorship of Appius.

⁶⁰ Livy, 1. 43: Dionysius, 4. 17. We hear very little of these supernumeraries (see however p. 527 on accensi).

⁷⁰ e.g., that of Cicero, de rop. ii. 22. 39: Dionysius, 4. 17, more particularly specifies the χειρότεκναι as carpenters and armourers. Livy, 1. 43, takes them with the first class, the cornicines tubicinesque with the fifth.

always ready to develope into the legion. The $\lambda o \chi a \gamma o i$ who were to keep their respective $\lambda o \chi o i$ obedient to orders⁷¹ are not mere drill sergeants: they are the best warriors, capable of independent command of a company or rather battalion, and, where required, of independent action.

The speech of Cato. The words of Cato Major, which have been a good deal relied upon by Mommsen, are, as it seems to me, capable of being taken in a simpler sense. Following the interpretation of Gellius, he takes them to mean that at some early time in the history of the Roman classes there was only one class, that the expressions classis and infra classem referred to that class, and that only, i.e., those possessed of 125,000 asses. I have briefly compared the early usages of the words classis and classes and do not consider that they bear out Gellius and Mommsen's view. I wish now to say a few words on the words and circumstances of Cato's speech. When supporting, with all the strength of his leathern lungs72, the lex Voconia (168 B.C.), the object of which was to prevent fortunes of the first class coming under a woman's control 73. Cato is speaking distinctly as a partisan, with reference to the class par excellence in which he is immediately interested: there seems to be no question of any other.

Roman aggression. The systematic exploitation, for aggressive military purposes, of a population, constitutes a formidable menace to the liberties of their neighbours, particularly if coupled with a cynical disregard for ordinarily recognised obligations and even express conventions. In the case of Rome, she succeeded, as we know, in destroying those liberties: she only fell, long afterwards, to invaders from

⁷¹ Dionysius, 4. 17 ad finem, λοχαγοί δ' έξ ἀπάντων ἐπιλεχθέντες οἰ γενναιότατοι τὰ πολέμια τοὺς ἰδίους ἔκαστοι λόχους εὐπειθεῖς τοῖς παραγγελλομένοις παρείχοντο.

⁷² Gellius, 6. 13. Cicero, de Senectute, 5. 14.

⁷⁸ Girard⁵, p. 820.

the "populous north." But in her Blütezeit, which I am inclined, with Macaulay, to place at the triumph of Marcius Curius (275 B.c.), she was certainly the mistress of Lower Italy.

As Rome proceeded from the smaller conquests of her immediate neighbours to the supremacy of Southern and Central Italy, the demand for a regularly organised military service increased and the amount below which immunity from it was allowed decreased proportionally. Some general commencement of the class system may, as we have seen, be dated from the time of the Twelve Tables. But the language of Dionysius about the phalanx and the details of the heavy armature which follow, though they appear to belong properly to the bringing of a regular Greek army into the field, i.e., to the invasion of Pyrrhus in 280 B.C., may refer to the original or native phalanx rather than to any anticipation of the Greek invasion. It has been shewn how some addition to the class system may possibly be dated before the notable change in the Roman armature (p. 495). For the final additions to that system, which were caused by the crisis of the second Punic war, and the explanation of Cicero's version of the Servian system, which can only be explained with reference to those additions we must refer to Polybius, the friend and companion of the victor of Zama 202 B.C. Previously there is a vast hiatus between Dionysius and Polybius to be explained. In the meantime I return to actual institutions of Servius.

Registration. The first step, according to Dionysius, towards the establishment of the Servian system, was a return, on oath, enforced by severe penalties, of each person's property, valued in money, according to the best of his ability, accompanied by a statement of his parentage, family and local residence⁷⁴. The style and manner of this registration require some consideration.

⁷⁴ Dionysius, 4. 15. Livy, 1. 44.

Census. If this word is really, as it would appear to be considered, an old one, one would expect its original meaning to throw some interesting light upon the first circumstances of the Servian system 75. As a matter of fact, it is entirely disappointing in this respect. The passages quoted by Mommsen (Msr. 3 ii. p. 331, n. 1) prove little beyond quite late meanings of censere76. The Greek equivalent, in Polybius, for censor $(\tau \iota \mu \eta \tau \dot{\eta} \varsigma)^{77}$ gives the meaning of "valuer" which is possibly intended in Varro's arbitros populi. Public valuation or assessment of property returned in specie is all that we can safely surmise as to the original meaning of census⁷⁸. But as to the denomination, there is no necessity to render it into the form given by the Roman historiographers. The proportions of the class qualifications are doubtless the same whether we accept Böckh's rendering of them or not79. The actual coinage is, as we know, later.

This much is clear—that the Servian census was intended as a record, to be periodically revised, of the persons in the Roman state liable for military service, and of the property in respect of which they were so liable, apparently reduced to a money valuation (but see below, pp. 508 sqq.): being first made by the reputed author of the system; on the establishment of a Republic, after an interval of tyranny, by the

⁷⁵ There is little to be made on the point, out of Livy, 4. 8 ad finem, or Dionysius, 11. 63.

⁷⁶ e.g., Varro apud Nonium, p. 519. Itaque quod hos arbitros instituerunt populi censores appellarunt; id enim valet censere et arbitrari. There may however be a reference here to the old meaning of arbiter; a "viewer" (Twelve Tables, 12. 3). Mommsen's Willkur may perhaps be made more clear by Karlowa's words nicht nach strenger Rechtsregeln sondern nach freien (RRg. i. p. 77).

⁷⁷ Polybius, 6. 13. 3. See the last note.

⁷⁸ The Skt roots referred to in connexion with the words censor or census by Skeat, Etym. Dict. p. 100; Pianigiani, Vocab. Etim. i. p. 264; Fick, Wörterb. i. p. 58; Vaniček, i. p. 150, and Brugmann, Grundriss, i. pp. 292, 426, are too distant and vague to be taken into practical account.

consuls; and, from some half century after the beginning of the Republic, by specially appointed censors⁸⁰.

Lustrum. The principal, if not the only, religious feature, in the whole of this arrangement, was the purification of the people which followed 81 ; possibly intended to avoid that $\phi\theta\dot{\phi}\nu\sigma$ $\delta\alpha\iota\mu\dot{\phi}\nu\omega\nu$ in which there existed a widespread belief through all antiquity 82 . The form came later to be applied to the census-period of five years.

Quinto quoque anno. This expression, attributed by Censorinus ⁸³ to the institution of the founder, is capable of some ambiguity, whether it means that an interval of four or of three years is to elapse between successive censuses ⁸⁴. It is generally taken in the former sense ⁸⁵, but the variation, to which Censorinus himself refers, may account for some of the chronological difficulties in our early Roman annals, into which I do not mean to enter here ⁸⁶. The manner of registration will be considered in detail under the head of the Servian *tribes*, which, being a difficult and complicated subject I propose to postpone for the present, as also the

⁸⁰ As to previous lustra, see Msr.³ ii. p. 334, nn. 2, 3. Seeley² (p. 89) and, I think, Mommsen deny too positively any connexion with religion.

⁸¹ Dionysius, 4. 22. See Jhering⁵, i. p. 277, n. 181. There is also, however, the institution of the compitalia (4. 14) attributed to Servius. But the drafting of freedmen (τὸ ἐξελευθερικὸν φῦλον) into the four city tribes (4. 22) which is connected with this, is evidently an anticipation of the form attributed to Q. Fabius in 308, Livy, 9. 46. No such censorship, as stated by Livy, l.c., appears in the Fasti. Decius and Fabius were consula in 303. The compitalia might well be utilised by Servius. The existence of freedmen at all, to any extent, in regal times, seems to me an anachronism.

⁸² See Herodotus, I. 32—34; 3. 43, 125; Aesch. Persae, 364; Agam. 921.
Compare Exodus 30. 12, 13; Job 1, 5.

⁸³ De die natali, c. 18. 84 Msr. ii. pp. 343, 344.

⁸⁵ Varro, L. L. 6. 11, 93.

 $^{^{86}}$ See Sect. 6 (die Lustra) of Mommsen's Röm. Chron. especially pp. 169 —171. I do not think the difficult passage of Pomponius (Dig. 1. 2. 2. 17) has anything to do with lengthening the time required for taking the census, but simply with the time for which it was over due, reading jam α majori tempore agendus esset.

consideration of the graded amount of property qualification, the varying character of the service required, and of such other contribution to state purposes as may have been added to that service.

Gradual developement of classes. At present I wish to revert to the generic distinction drawn by the Roman antiquaries or antiquarian historians, in their old law, down at least to the Twelve Tables, between the more substantial citizens, with their corresponding liabilities, and the lower or poorer part of the populus. For the terms employed to mark this distinction, and even their incorrect explanation by Roman etymologers, point significantly to a fundamental principle in the original Servian organisation—to a time when according to Mommsen there was possibly but one class, all others being infra classem (see above, p. 500). The members of the former were styled, according to Cicero⁸⁷ by Servius himself, the assidui, the latter the proletarii.

After the gentile circle is closed and the long contest between Patrician and Plebeian begun, which it was the evident object of the Tarquinian kings to pacify, the question of private ownership of land is not so much between the individual gentilis and the common rights of his gens as between the individual poor citizen, presumably plebeian, and the disposers of land acquired in community by the people as a whole. A considerable distribution of land to the labouring class $(\tau o \hat{\iota}_S \theta \eta \tau \epsilon \acute{\nu} o \nu \sigma \iota \nu)$ is attributed to Servius⁸⁸, and a return which Dionysius says was to be

⁸⁷ Cicero, de rep. 2. 22. 40.

⁸⁸ The $\theta \hat{\eta} r \epsilon s$ were, as is well known, the fourth and last class in the Solonian arrangement (Plutarch, Solon, 18). They would seem to correspond fairly well to the original Roman proletarii (see however pp. 511 sqq., 529 sqq.). I dare not however base any argument as to the legal position of the inferior occupants of Roman land upon Dionysius' implied comparison, because of the varying and unsatisfactory character of the explanations which have been given of the Greek word. Many authors confine themselves to description of the $\theta \hat{\eta} s$ as a worker for hire, or bondman (Leibeigener) without further

made of such citizens as had not yet received an allotment⁸⁹.

All this will, of course, be regarded by the school of Pais as pure fiction, suggested in some degree by the practice of the united Roman people in historical or quasi-historical times. A general credence given to such statements appears to me to furnish a better explanation of the existence, at a pre-republican period, of the plebeian proprietor, and the consistent denunciations, in our early histories, of the patrician possession of public land as so illegal and unscrupulous⁹⁰.

We must, of course, assume such allotment to be accompanied, as it usually has been in similar cases, with an agricultural occupation of some definite portion of land left, on the whole, as "waste" or common—Mommsen's "Flur." It is probably with reference to this that he speaks of the extension of private ownership to the landed property of the tribe generally (as Cuq, i. p. 90). The practice of allotment and definition of occupation may be conceived as not impossible with the older *gentes* when they may be believed to have still retained some corporate action (§ 5, p. 156).

remark. See Benfey, Wurzellexicon, ii. p. 267, and Brugmann, Grundriss, ii. p. 366. Vaniček makes him one who puts out himself or his services on hire (locat operam as Buttmann expresses it). The last named author (Lexilogus, tr. 1861, p. 350, n. 3), prefers to take the common root θa , which all recognise in the word, in the sense of sit which he traces in Sophoeles' $\theta a d ere$ (Oed. Tyr. 2) and suggests that the $\theta \hat{\eta} res$ were the Insassen, the original settlers or old inhabitants of the country. This might suit the case of Attica, but certainly does not agree so well with that of Rome as neither does the Homerio meaning of villain (Od. 11. 489) or the Hesiodic one of bailiff (Op. et D. 602). The condition of the plebeian holder under a patrician lord probably varied between the latter position and that of metayer tenant.

89 See Msr. 3 iii. p. 244, n. 4, and particularly Dionysius, 4. 10. έξέθηκεν έν φανερώ διάταγμα βασιλικόν έκχωρεῦν τῆς δημοσίας γῆς τοὺς καρπουμένους τε καὶ ἰδία κατέχοντας αὐτὴν ἐν ὡρισμένω τινὶ χρόνω καὶ τοὺς οὐδένα κλῆρον ἔχοντας τῶν πολιτῶν πρὸς ἐαυτὸν ἀπογράφεσθαι.

90 Dionysius, 8. 70. χώραν...δση πολέμω κρατηθεῖσα λόγω μὲν ἦν δημοσία ἔργω δὲ τῶν ἀναιδεστάτων τε καὶ σὺν ούδενὶ δικαίω κατεσχηκότων πατρικίων.

Plebeian ownership. Hitherto, however, as it seems to me, we have only accounted for the spread of private ownership of land among the Patricians, and the arguments of Mommsen and others appear to stop there⁹¹ instead of dealing with the problem of plebeian ownership or occupation.

May we not presume an original occupatio of after acquired land by the patrician gentes followed gradually with a de facto tenure of certain portions, by Plebeians, from them⁹², either free, or on terms of service or rent? In such cases the alleged distribution of public land by Servius was, in the popular point of view, no more than a resumption of public right, effected probably by means of his new register, which turned these plebeian holdings into ownership. This would be of a piece with the passing of the Client into the free Plebeian, for which I do not think Mommsen accounts at all adequately; and would explain, to a considerable extent, the successful usurpation of Superbus, supported by a number of patrician malcontents, with a real grievance⁹³.

We know that the general object attributed to Servius was to unite the orders by raising the Plebeians. How the Plebeians came to be landed proprietors or occupiers to such an extent as to form a substantial part of the main division of the Servian subjects or cives is a difficult question. We know that in the reputed consulship of the second year of the republic, after the judicial murder of Sp. Cassius there was a considerable number of citizens, occupiers of land which did not belong to them, for the consuls, by way of inflicting a penalty on these persons for failure to render military service, to which they were liable, could only do so by confiscating their farming plant and

⁹¹ e.g., Greenidge, Legal Procedure, p. 220, is evidently speaking rather of the Patrician, who holds precario from the state, than of his subtenant.

 $^{^{92}}$ I do not see why Greenidge's tenure *precario* from the state by the Patrician need come into question here.

⁹³ Msr. 3 iii. pp. 76, 84, &c.

flocks: whereas in the case of others, to whom their lands belonged, they could cut the standing crops and pull down the farm buildings⁹⁴. It is these presumably plebeian occupiers for whom we have mainly to account.

It would be scarcely correct to suggest that Servius turned plebeian possessio ad interdicta into possessio ad usucapionem. This is the language of a later jurisprudence, and usucapio, if it existed at all, had still to be recognised and regulated by the Twelve Tables (Tab. 6. 3). But some measure having this effect must I think be assumed to account for the number of plebeian proprietors occurring so early, by the side of patrician ownership, testified in the names of the tribes. It may perhaps be compared with the operation of our Statute of Uses in the short interval before the doctrine of Trusts was devised. Only, it was much more of a confiscation to the patrician landholder at Rome, than to ours, where it has been represented as a mere temporary inconvenience.

However produced, it certainly seems necessary to assume a substantial amount of *ownership* of land by Plebeians, at the time of the first beginning of the so-called Servian system; for the details of the class arrangement, particularly its representation in money, are, as has been shewn (p. 499), most probably a later development.

In the case of the earlier tribes, in other words the legendary Romulian time, we hear of two-acre plots allotted to individuals in private or several property, which, Varro tells us, were long a unit of taxation (§ 5A, p. 215). As to these allotments I have ventured to question Mommsen's positive



⁹⁴ Dionysius, 8. 87, 271 B.C. I have ventured to interpret this extract rather differently from Cuq, i. p. 90, who cites it, as it seems to me, in proof of an original passage of gentile common land into the private property of individual gentiles.

⁹⁵ See Bright, Hist. of England (1882), ii. p. 405.

denial of their possible sufficiency, in early practice, or constitutional law, for a single warrior and his family.

Grundbesitz. All or almost all modern authorities are. I think, agreed in making landed property the principle of the Servian classification, though estimation in money value is distinctly intimated by Dionysius and implied by Livy96. The Greek coinage introduced or modified by Solon was known and used in Italy97 long before the Romans had a coinage of their own. But, in any case, the absolute amounts stated by Livy and Dionysius are, as was pointed out long ago by Böckh, much too high for the end of the monarchy, or the beginning of the Republic, seeing that 10,000 asses, aeris gravis was accounted as wealth 500 years later98. The impossibility of a person owning 11,000 or 12,50099 being entirely exempt from taxation or military service is obvious. And the prominence of position given to landed property is apparent, not only in the story of Servius' division of the whole territory into local tribes 100, but in the character of the farming equipment which constituted the property requiring a solemn act of transfer, as being a special subject of registration101

An ingenious attempt is made by Professor Ridgeway to shew that the Servian rating was by ownership of cattle¹⁰². We know that in the system of Solon, which was evidently

⁹⁸ Dionysius, 4. 15, 16: Livy, 1. 43.

⁹⁷ Ridgeway, Currency, pp. 306, 324, 368. But whether this is true of the mina (reckoned at 1000 asses) I do not know.

^{98 418} B.C. Livy, 4. 45. Indicibus dena milia gravis aeris, quae tum divitiae habebantur, ex aerario numerata. Ridgeway also refers (p. 370) to the estimate of an ox (or cow) at 100 asses (Festus, P. p. 24, Aestimata and p. 144, Maximam multam) by the lex Tarpeia B.C. 454, see Festus, F. p. 237, Peculatus.

^{*9} Livy, 1. 43, gives the former, Dionysius, 4. 18, the latter, as the fortune of those who were exempt as πένητει οτ ἄποροι.

¹⁰⁰ Dionysius, 4. 15.
101 See Appendix II, on res mancipi.

¹⁰² Ridgeway, p. 31, App. B. See Maine, E. H. pp. 147, 180. See also below, p. 551. I do not find much on this subject in Ginnell's book.

copied by Rome, the means of the classes were calculated in agricultural produce¹⁰³. On the whole, however, I prefer to accept Mommsen's idea of land, taking into account the previous considerations and the surviving practice of entering land under the head of some tribe, referred to by Cicero (n. 115). Seeley² (p. 85) suggests that the numbers in the passage quoted from Livy, and his account of the Servian system, refer to the coinage of the first Punic war, and should therefore be divided by 5 (or 6); which will perhaps meet this particular difficulty, as far as Livy is concerned. But an almost greater remains.

Land, as the primary rating denominator, is distinctly assumed by both Moyle and Muirhead. We may note, in particular, the term *freeholder* repeatedly predicated of members of the *classes*¹⁰⁴: but probably the strongest argument in favour of this view is to be found in the well-known division of property by the method required for its transfer.

Here I leave the development of the class system until we come to the testimony of Polybius. That development is here, and I think, on the whole, in the view of Mommsen, considered to be a work of time, due to successive levies made as they were required by Roman needs, each levy constituting a fresh draft upon the persons originally free from service and starting a fresh body henceforth liable. We are obliged absolutely to discard an occasional assumption apparently made by Mommsen that the classis regarded as that of the wealthy could ever have been actually equal in number to that of the poorer members of the community (see Seeley, p. 84).

In speaking of the development of the class system by means of successive levies, I have rather assumed those

¹⁰⁸ Plutarch, Solon, c. 18.

¹⁰⁴ e.g., Moyle, Instt. Just. p. 7: Muirhead², p. 55 and § 13, generally. See however Prof. Goudy's notes 9 on p. 39 and 2 on p. 55.

levies to be for actual service. But it must be remembered that in the theoretical or legendary account of the Servian system the classes are clearly matter rather of muster or array, see p. 499.

Absorption of the old proletarii. It is during the earlier developement of the legionary system, that we must trace the absorption of the poorer classes into regular military service; first probably as light armed supernumeraries, then as a distinct enlargement of, or addition to, the phalanx of which the legion originally consisted 105. On this subject I have already spoken generally and shall return to the matter when I come to the developement of the legion.

Capite censi remains the designation of the really poor nullo aut perquam parvo aere¹⁰⁶.

105 Of this transition from the original phalanx to the manipular arrangement of the army I have said a few words already (p. 497). Mommsen, who dates the change as running from 406 B.C. to the close of the republic, only gives what appears to me a confused and unsatisfactory account. He appears to assume not merely from the beginning the existence of three tribes, but also the existence, from Servius' time, of five classes, the latter being, in my view, if not in Mommsen's own, matter of subsequent formation. See however Msr.3 iii. pp. 294, n. 2, &c., and the references generally under v. legio in the index. How far Mommsen means to discard the speculations of his Jugendschaft, as he calls it, in the maturer Staatsrecht (Msr. iii, p. 268. n. 2 ad finem) I do not know. For myself, I have found the "Tribus" of 1860 in some respects more useful and intelligible. In spite of Mommsen's own depreciation of his earlier efforts I must admit that his mode of explanation of a hiatus, which I shall have shortly to consider, between the minimum of Dionysius and the new proletarii of Polybius is drawn from his "Tribus." The earlier part of the account of the new levies drawn from the lower classes is taken up with the suggestion of new legionaries. After these he places the classiarii to the number of 4000; then the later proletarii and capite censi.

I do not find the word classiarius used before the naval service had become a permanent institution in the times of the empire. Earlier the name seems to have been socii navales. This does not mean a non-Roman body but a class of Roman citizens mostly of libertine rank (Livy, 36. 2; 40. 18, 27; 43. 12).

106 Cicero, de rep. 2. 22: Gellius, 16. 10. 10. These were armed for the

Hiatus between Dionysius and other writers. This hiatus is as follows: the fortune of the lowest class in the traditional Servian system is put at 12,500 asses. But for Polybius the fortunes exempt from personal service are no longer those below 11,000 or 12,500 asses but those below 4000 asses 107, and even these are liable for naval service 108 and on great emergencies for that on land 109. But Cicero however, who accounts with fair arithmetical success, but by dint of much traditional or fanciful linking of centuries, for the whilome preponderance of the wealthy classes in the old comitia, has now to put the proletarii at the small fortune of 1500, instead of 11.000 or 12.500, as also does Gellius 110. Cicero's account must be read as referring to his own time¹¹¹. In the interval therefore between Servius' reputed epoch and Cicero there must have been a vast number of additions to the original register-additions whom we might call by the general name of accensi¹¹², additions to the census—were it not for the technical meaning, which, according to good evidence, the word actually bore, and which will require an explanation when we come to the subject of supernumeraries.

The absorption of the original proletarii necessitates a new meaning for that expression which we accordingly find first time by Marius in the expedition against Jugurtha, 107 B.C. Sallust. Jugurtha, 86: Plutarch, Marius, 9.

107 So Böckh interprets the 400 drachmas of Polybius. Mommsen,

Tribus, p. 114.

108 Considered the inferior down to the times of the empire, as compared with the justa militia. See Suetonius, Galba, 12: Tacitus, Hist. 3. 50.

This is, in fact, indicated in Polybius, *apiâoiv.

109 Polybius, 6. 19. 2, 3. οὐ δεῖ στρατείας τελεῖν κατ' ἀνάγκην ἐν τοῖς τετταράκοντα και έξ έτεσιν άπο γενεάς πλην των ύπο τας τετρακοσίους δραχμάς τετιμημένων · τούτους δέ παριασι πάντας είς την ναυτικήν χρείαν · έαν δέ ποτε κατεπείγη τὰ της περιστάσεως δφείλουσι και πεζή στρατεύειν.

110 Dionysius, 4. 18: Livy, 1. 43, makes them possess 11,000.

111 Msr.3 iii. p. 275, n. 1.

112 Cicero, de rep. 2. 22. 39, 40: Gellius, 16. 10. 10. Lewis, Credibility of Early Roman Hist. i. p. 501, gets rid to some extent of the difficulty by making Cicero's number 15,000. I do not know his authority.

in Cicero and Gellius¹¹³. They are now persons of not more than 1500 asses fortune, who were only occasionally enrolled in tumultu maximo being armed at the public expense.

The tribes and the phrase Censui Censendo. The latter is an expression meaning "proper for entry on the census" by which Festus tells us that lands capable of being bought and sold jure civili were properly known¹¹⁴. They became res mancipi by entry for census under the head of some tribe, selected by their owner, and as so entered liable it may be as a matter of fact to a double tribute, that of, e.g., Apollonia as provincial, that of Rome (see below, p. 518), if any need for tribute should occur to Rome. All these are put as the consequences of such entry in an interesting passage of Cicero's speech for Flaccus¹¹⁵.

Their connexion, or not, with previous divisions. With the old three racial divisions the tribes of Servius had nothing in common but the name. Their connexion with the curiae, and the constituents of the curiae, the gentes, is in my opinion more real.

The tribes. Their original object. Although, no doubt, the Servian tribes were, as far as they went, identical with their political successors in history, they do not appear to have anything directly political about them in the beginning. Their object is represented as being simply that of registration: but in this evident practical purpose they differ at once materially from the gratuitous parcelling out of his handful of subjects attributed to Romulus¹¹⁶.

¹¹⁸ Cicero, de rep. 2. 22: Gellius, 16. 10. 10.

¹¹⁶ Festus, P. p. 58. Censui censendo agri proprie appellantur qui et emi et venire jure civili possunt.

¹¹⁶ Cicero, pro Flacco, 32. 80. Illud quaero sint ne ista praedia censui censendo—habeant jus civile—sint necne sint mancipi—subsignari apud aerarium aut apud censorem possint—in qua tribu denique ista praedia censuisti? Commisisti, si tempus aliquod gravius accidisset, ut ex iisdem praediis et Apollonide et Romae imperatum esset tributum?

¹¹⁶ See on Romulus' division of his people into tribes and curiae § 1, pp. 8, 12.

If historical evidence were wanting, as to the meaning and object of the original tribal division of Servius it may be found directly in the expression censui censendo and the above mentioned practice preserved down to the time of Cicero.

We know of a Romulian division of the people, and their sacra into 30 parts, to the sanctuaries of which were added, at some unknown late 117 period, certain new curiae for accommodation in point of room, on which occasion four of the old ones were left undisturbed, for religious reasons¹¹⁸. That the curiae were certainly used as local divisions without distinction of order, if not to the exclusion of Patricians, in the election of the earliest Tribunes of the plebs (see § 9, pp. 324, 325, nn. 68, 69) is satisfactorily proved 119. There are other common features, and, on the whole, in spite of difficulties of number produced by an anticipation of the 35 tribes known to the literary period, and of the special objection of Mommsen¹²⁰, I am disposed to recognise a direct connexion between the Servian tribes and the old Curiae, the latter being regarded as local districts. It is not perhaps quite correct to say that the tribes were expressly intended to supersede the curiae, because I do not believe that the tribes were originally meant to have any direct political significance.

Servius is also distinctly represented ¹²¹ as utilising the pagi, or country districts, as a means of ascertaining their population, by the institution of a festival, the Paganalia. The Census-taking was, at any rate, facilitated thereby; but the connexion with the pagi is not so close as with the Curiae.

Dionysius, 4. 15

¹¹⁷ On account of the reference to the compitum Fabricium. Burn, Rome and Campagna, p. 265.

Festus, F. p. 174, Novae Curiae: cf. Varro, L. L. 5. 155.
 Above § 9, n. 48.
 Forsch. i. p. 143.

¹²¹ Dionysius, 4, 15.

Έπτὰ πάγοι. The Septimontium has a curious history (p. 326) which may be mentioned here, as it bears upon the best explanation of the reduction of the Roman tribes, as we shall presently see, to the number of 20.

At some time after the institution of the above festival, a similar union was apparently conceived of the outlying districts. This is represented, in one legend, as land acquired from the Veientines, beyond the Tiber, by Romulus¹²². That fact might not have been worth mentioning; but it is noticeable that the transfer of the same $E\pi\tau\lambda$ $\pi\dot{\alpha}\gamma\omega$ to Porsena is mentioned, somewhat incidentally, afterwards by Dionysius, and constitutes one of the very few distinct admissions of the victory of the Etruscans over the early Republic¹²³.

As to the origination of any of these festivals by Servius, see above on the compitalia. I do not think any connexion of the tribes with the ancient pagican be maintained. We are told indeed by Dionysius that the country tribes were fixed with regard to the Hill occupants (κατὰ τοὺς ὀρεινοὺς) of the petty fortresses to which they could retire on occasion, and from which they derived their name¹²⁴. But Fabius Pictor called the country districts ψυλαί, like the town divisions to which he adds them, as in simili materia¹²⁵.

Dionysius and the Servian division. According to Dionysius, Servius began with the city, which he had previously enlarged and surrounded with a wall¹²⁶. Mommsen

¹²² Dionysius, 2. 55. ¹²³ Dionysius, 5. 35.

these really are different words (see § 9, n. 74). No doubt the points of vantage, if any, were actually occupied by the original settlers. If the old derivation (see Liddell and Scott) of $\kappa\rho\eta\sigma\phi\dot{\nu}\gamma\epsilon\tau\nu$ has anything in it, we may compare it with the story of the Argive (§ 9, n. 85). Whether called Cretes or Argives, the subjects of King Minos were, no doubt, alike pirates, and liable to a pirate's fate if caught. The splendours of Minos' Palace were not all gained from the produce of Crete.

¹²⁵ Dionysius, 4. 15.

¹²⁶ Dionysius, 4. 13. I leave the discussion of the alleged extant frag-

considers a division of the country district into pagi and the town district into montes equally old¹²⁷: this is not exactly the impression which Dionysius' account gives us. He begins with the enclosure of the Seven hills, and the division of the city district into four parts, with names derived from the main eminences or other natural features, Palatine, Suburan, Colline and Esquiline¹²⁸. Coupled with this we have the usual story of institution of an obviously old festival, the compitalia, like the country paganalia, for convenience of registration¹²⁹. The seven heights mentioned by Dionysius

ments to pure antiquarians. I have examined them in former days and believe in their genuine antiquity, but have had no recent opportunity for personal investigation.

127 Tribus, p. 16, quoting Varro, 6. 24.

128 The names were probably already existing. Dionysius (4.14) says the Tribes were named έπὶ λόφων, Livy (1.43), regionibusque ac collibus qui habitabantur. The Subura, so called from underlying an older city boundary than the Servian (see Varro, 5.48), is of course not a hill at all. What Sucusana, preserved by Festus, F., p. 302, means I do not know. It can scarcely be under the Casa (Romuli). Varro's derivation, l.c., or Festus' stories are not worth consideration. Dionysius, 4.15. Διείλε δὲ καὶ τὴν χώραν ἄπασαν, ὡς μὲν Φάβιος φησιν εἰς μοίρας ἐξ καὶ εἶκοσιν, ἀς καὶ αὐτὰς καλεῖ φυλάς, καὶ τὰς ἀστικὰς προστιθείς αὐταῖς τέτταρας—ὡς δὲ Οὐεννώνιος ἰστόρηκεν εἰς μίαν τε καὶ τριάκοντα —ώστε σὺν ταῖς κατὰ τὴν πόλιν οὐσαις ἐκπεπληρώσθαι τὰς ἔτι καὶ εἰς ἡμᾶς ὑπαρχούσας τριάκοντα καὶ πέντε φυλάς. Κάτων μέντοι τούτων Διφοτέρων ἀξιοπιστότερος ὧν τριάκοντα φυλάς ἐπὶ Τυλλίου τὰς πάσας γενέσθαι λέγει καὶ οὐ χωρίζει τῶν μοιρῶν τὸν ἀριθμόν.

I have translated this, supplying the anacoluthon at $\tau \acute{\epsilon} \tau \alpha \rho as$, from the text of Jacoby (Dionysius, ii. p. 28), who follows the emendations of Niebuhr and Kiessling. The original reading will be found in Jacoby's note 7, l.c. The object of Vennonius is, of course, to make out the number known to him. He is occasionally coupled with Fabius, but is generally considered to belong to a later period. The statement is simply characterised by Mommsen (Tribus, p. 5) as absurd.

129 The paganalia (Dionysius, 4. 15) speaks for itself. It is from the gatherings of the rustic districts that the rude inhabitants, who kept to their old religion, were long after stigmatised as Pagan. The compitalia (Dionysius, 4. 14) are not quite so obvious. Compitum is not exactly rendered by $\sigma \tau e \nu \omega \pi \delta s$, but the risk of being crushed or run over in the narrow street or crossing of a city, is the same and might equally suggest the need of a tutelary deity.

are specified by name in Festus¹³⁰ including the Subura. The festival known by the name of the *septimontium*, see p. 326, though we have no account of its institution by Servius, is probably an old one, from the manner in which it was preserved and copied in the provinces¹³¹. Varro distinguishes it from the *paganalia*, there being, according to him, *two* festivals appertaining respectively to the Hill and Plain people¹³².

As has been intimated, I should be disposed to set back all these popular celebrations to a time before any consolidation, whether under Tarquinius Priscus or Servius, and consider them merely utilised by the latter, as means of registration, through the universal attendance, on the stated feast days, at the altar of the district. The same motive may be seen in the imposition of a yearly poll tax on each city householder, to be paid into the treasury of Juno Lucina, Venus Libitina and Juventus for every birth, death and arrival at manhood of a male child¹³³.

To return, however, to Dionysius' Servian division; it proceeds thus: "He" (Servius) "also divided the whole territory, according to Fabius, into 26 parts, which he" (Fabius) "likewise calls tribes, and adding to them the city four" (makes the total 30): "but, as Vennonius tells us, into 31 parts, so that, with the city tribes, the 35 tribes were

¹³⁰ Festus, F. p. 24, septimontium.

¹³¹ Msr.³ iii. p. 114, n. 4. ¹³² Varro, L. L. 6. 24.

¹³³ Dionysius, 4. 15. βουλόμενος καὶ τῶν ἐν άστει διατριβόντων τὸ πλῆθος εἰδέναι τῶν τε γεννωμένων καὶ τῶν ἀπογινομένων καὶ τῶν ἀπογινομένων καὶ τῶν ἀπογινομένων καὶ τῶν ἀπογινομένων καὶ τῶν αποσήκοντας εἰς μὲν τὸν ἔταξεν ὅσον ἔδει νόμισμα καταφέρειν ὑπὲρ ἐκάστου τοὺς προσήκοντας εἰς μὲν τὸν τῆς Εἰλειθυίας θησαυρὸν ἤν 'Ρωμαῖοι καλοῦσιν "Ηραν φωσφόρον ὑπὲρ τῶν γεννωμένων κ.τ.λ.

As to the goddess of birth see above § 2, p. 41. An indifferent reason is given in Plutarch's Quaestt. Rom. 23, for the strange connexion of Venus Libitina with death (there is the same idea in his Numa, c. 12): her grove (see Dionysius, l.c.) is one of the places which according to Burn, Rome and Campagna, p. 243, cannot be determined. There is however a lucus Poetelius on the Cispian hill, next to the temple of Juno Lucina (Varro, L. L. 5. 50).

made up, which exist to our own times: but Cato, a better authority than both Fabius and Vennonius, simply says that the total number of tribes in Tullius' time was 30, without separating the numbers of the two constituent parts¹³⁴."

Number of the original tribes. We see, then, that, though the old authorities differ in some respects, there is a predominant agreement as to the total number of Servius' tribes being the favourite 30—that of the old curiae. With the pagi of Numa or the Argean chapels, I cannot so satisfactorily trace a connexion, although the number of the victims, or substituted images, stated by Dionysius, in obvious relation to the latter, is suggestive 135. Varro 136 does not agree, and I must confess that I look with suspicion upon any tradition, involving the number 30, as preceding the Tarquinian dynasty 137. Varro's expression, when after enumerating four "parts of the city" the Suburan, Palatine, Esquiline and Colline, and a fifth, Romilia, he speaks of the other 30 tribes 138, is evidently in accordance rather with Vennonius' calculation than with that of Fabius.

In addition to what has been said above, we have a vague statement by Varro of 27 partes urbis, over which the Argean chapels were distributed 139, and a Numan or Romulian tradition, on the other hand, of 26 extra-urban districts 140.

¹³⁴ Dionysius, 4. 15. See n. 128.
135 Dionysius, 1. 38. See § 9, n. 74.

¹³⁶ According to Varro the *Simulacra hominum* are 24 with one variant reading of 23 (L. L. 7. 44). Aldus' correction to 30 is recognised by Müller (p. 137) as taken simply from Dionysius, 1. 38.

¹³⁷ See above, § 6, p. 247 and § 9, p. 315.

¹³⁸ Varro, L. L. 5. 56 (74). See Burn, p. 37, who considers the traditions to indicate an intermediate extension between the *septimontium* and the ultimate wall of Servius.

¹³⁹ Varro, L. L. 5. 45. See Nonius, p. 43, viritim: M. Tullius de Rep. lib. ii. (14. 20). primus (Numa) agros, quos bello Romulus ceperat, divisit viritim civibus: and ib. below, n. 140.

¹⁴⁰ Varro, de vita populi Romani, 1. et extra urbem in regionibus xxvi. agros viritim liberis adtribuit. See § 9, n. 70.

Now, in the dubious times of the Early Roman Republic, there is evidently a drop, in the number of Tribes, to a total of 20; for they are stated by Livy to be made up to 21, by the accession, according to the periocha of his second Book, of the Tribus Claudia¹⁴¹. After this 21st Tribe, the additions, at various times, making up the later historical 35, are all specified on fairly good authority; their names being distinctly traceable to local additions of territory¹⁴². On the 21st tribe I shall speak presently. As to the lost ten see above, p. 514 and below, p. 558.

As to the order and style of these older tribes, their actual ordo can only be partially determined from various scattered pieces of information¹⁴³. We know that the four city tribes came first, with their obviously local names¹⁴⁴. As obviously the succeeding 16 rural tribes are named after gentes, which, it must be presumed, had their lands mainly in the particular district. Mommsen¹⁴⁵ gives an alphabetical list of these.

Tributum. Whether tributum or its verb tributere indicates the payment by the Tribes, or the amount assigned to the Tribes, for payment, makes no material difference 146. A Romulian, or at least pre-Servian tributum 147, is improbable and not worthy of consideration 148. Payment of the army stipendium became a principal object of the tributum in historical times 148. It was first introduced, we are told, in 406 B.C., before which time service was at the soldier's own

¹⁴¹ Livy, 2. 16 and periocha of Book 2.

¹⁴² Msr. 3 iii. p. 171, nn. 1—8 and p. 172, nn. 1—9.

¹⁴⁸ ib. p. 174, nn. 5, 6, 7.

¹⁴⁴ Varro, 5, 56. 145 Msr. iii, p. 168.

¹⁴⁶ I prefer the latter explanation of this by no means easy word.

¹⁴⁷ See Littré, s.v. tribut, and Pianigiani, s.v. tribuire.

¹⁴⁸ See also Varro, L. L. 5. 181, and the somewhat unnecessary note of Mommsen, Msr. iii. p. 227, n. 4.

¹⁴⁹ See however Msr. iii. p. 103, n. 2 and p. 228, n. 2.

expense¹⁵⁰, so that the tribute must have been originally for general state purposes¹⁵¹.

Pliny tells us that the Roman people ceased to pay tribute, after the bringing in of the spoils of Macedon by Aemilius Paulus in 166 B.C. ¹⁵²; an exemption which lasted down to the time of Diocletian, with the exception of a brief resumption during the Civil War of 43 B.C. ¹⁵³ After 166 B.C. the burdens, which could not be borne in perpetuity by the Macedonian spoils, began to fall upon the provinces on land which was not juris Romani, and which was accordingly called ager tributarius or stipendiarius, a distinction which does not now concern ¹⁵⁴ us. Anyhow tributum is a land tax, and laid primarily on land which is juris Quiritarii ¹⁵⁵.

Tribules and aerarii. The tribe, to which a man belonged, was settled, in the first instance, by the district in which his chief possessions lay, at the time of taking the census, and was apparently once variable by transfer or new acquisition¹⁵⁶, though afterwards it became hereditarily transmissible. Removal to a less influential or honoured tribe, in the recognised ordo, was probably a power acquired by the Censor in later times, as also the extreme measure of reduction to the aerarii, with the reverse of restoration to a tribe¹⁵⁷.

¹⁵⁰ Above, pp. 494, 495.

¹⁵¹ There is an incidental record of its imposition before the secession of 494 B.C. (Livy, 2. 23).

¹⁵² H. N. 33. 56. Varro makes it go on only up to the first Punic war. See § 5a, p. 215, n. 33.

¹⁵³ Msr.3 iii. pp. 228, 229.

¹⁵⁴ See Frontinus, 2. 36. On this difficult passage, which is given in Bruns⁶, ii. p. 89, neither Lachmann nor Rudorff vouchsafes any comment. "Nexum non habent" of course means "are not res mancipi." "Neque possidende ab alio quaeri possunt" is a clumsy way of saying "are not capable of usucapio," see Ga. 2. 46. Another disputed phrase ex aequo ac si, &c., is explained by Roby, R. P. L. i. p. 430, n. 1, to mean merely just as if, not equiably or "on equitable grounds" as it is often taken.

¹³⁵ See Msr. ii. pp. 1093, 1094.

¹⁵⁶ Msr. iii. pp. 182 sqq.; Karlowa (RRg. i. p. 80) thinks it was heritable from the beginning.
¹⁸⁷ Msr. ii. pp. 401 sqq.

. The aerarii (? = tax payers) are, in the reform of Ap. Claudius Caecus, citizens who, not having landed property, were immune from military service, and excluded from voting as tribules in either comitia, but were still rated for taxation according to their means, and possibly on a higher proportionate rate 158. These disabilities continued to attach to the lowest-grade of citizens after the original proletarii had been largely absorbed into the classes (see above, p. 510) 159.

How the suffrage, nominally shared by every member of the *populus*, was really monopolised by the rich, will be considered presently (see p. 540).

The timocratic character of the comitia centuriata is apparently retained throughout, and in spite of, the reform of Appius, which, according to the scanty and hostile notices that we have of it, consisted principally in the introduction of a large radical body of previously unenfranchised persons, mostly manumitted slaves or their descendants, into the tribes, and though the general effect of this creation of a forensis factio was temporarily reversed by the redistribution of Fabius¹⁶⁰ eight years afterwards, the result of a change of the landowning into a money qualification, in the city tribes, appears to have remained¹⁶¹.

241 B.C. is the date usually given to the final closure of the list of tribes, though Mommsen, Msr.³ iii. p. 172, n. 9, is inclined to place it a little later, in the censorship of Flaminius 220. It is to this popular champion that we must assign the last distribution of land before the troubles of the Gracchi.

¹⁸⁸ Msr.³ ii. pp. 402, 403. Was not this, however, effected, as a penalty, by the censorial artifice of multiplying the property taxed? See Livy, 4. 24.

¹⁵⁹ The tribules were also aerarii in fact: but only the latter class were specially called so, on the principle stated in Msr. iii. pp. 231, 840, n. 2. As to their higher rating, ib. p. 228.

¹⁸⁰ Livy, 9. 46. The dates may be given roughly, for the present, as 312, 304.

¹⁶¹ Msr. iii. pp. 251, 451, see however ib. p. 444.

The establishment of the complete scheme of five classes though still attributed by some to Servius himself, is generally placed later by modern authors, who suggest various dates, inclining on the whole to make it the work of some member of the moderate liberal family the Valerii (Publicolae), either on the establishment of the Republic or some 60 years later¹⁶². It is, I think, a work of time, best possibly connected in its beginning with the aristocratic reaction which is certainly indicated in the last two of the Twelve Tables, see however above, p. 493. There seems possible, to me, a sort of bargain struck between the noble and the wealthy plebeian interest. The timocratic character of the Servian reform is evident throughout; much accentuated in the fully developed class system, but, to my mind, apparent even in the severe laws of debt in the earlier part of the Code.

Cicero, in the Republic, written hastily in what leisure he could command during his life as a practical statesman¹⁶³, accounts for this predominance in the old comitia centuriata by an ingenious calculation¹⁶⁴. His assumed accession from the lower classes being granted, the majority of the first follows, as a matter of arithmetic, correctly enough: but it depends on various hypotheses. The linking of the fabri tignarii with the first class is fantastic or intentionally partisan, and the fact of the number of the centuries remaining constant from the beginning, though the number of

¹⁶² Dates which have been suggested are, besides the foundation of the Republic, that of the lex Publilia, 472 B.C., the consulship of Valerius, 449 B.C., &c. Mommsen, in one passage of Msr.³ (ii. p. 276) goes so far as to say: Die Epoche vor den Hannibalischen Krieg kennt die fünf Classen nicht.

¹⁶³ Cum gubernacula reipublicae tenebamus. De divinatione, 2. 1. 3.

¹⁸⁴ Cicero, de rep. 2. 22. 39. That he differs from Livy and Dionysius in giving the first class only 70, instead of 80, centuries, is a careless understatement of his case, or a misreading, on which a great deal of criticism has been made. Into this I do not mean to enter. The passage has been voluminously discussed by Karlowa, RRg. i. p. 71. 1, and slightly by Lewis, Credibility, etc. i. p. 491, n. 63.

tribes is, historically, increased, is rather inexplicable. The general principle, however, is clear—that the centuries of the rich were more numerous than those of the poor, although Cicero himself tells us that there were more *individuals* in one century of the latter than in the whole first class¹⁶⁵.

In face of the incredibility, in any period of any state, of the rich ever exceeding the poor numerically, we are driven to the conclusion that the voting century is something entirely different from the supposed ancient military division of a literal hundred men¹⁶⁶. It may have meant a certain amount of landed property, with a constant voting power, but a diminishing number of proprietors, as accumulation of such property, in single hands, increased. Anyhow, whether in consideration of heavier military service and taxation. or not, the alleged fact remains that the number of votes, or voting groups, assigned to the first class was larger than that assigned to any other 167 and so downwards to the illusory, or seldom exercised, single vote of the entire proletariate. Karlowa 168 prefers to follow the idea of Niebuhr, who supposes that votes were given to each class respectively in the proportion which the amount of its taxable property bore to the taxable property of all169. But this seems to assume that the arrangement of the classes and centuries was made once for all, whereas it was more probably a

¹⁶⁵ l.c. ad finem.

¹⁶⁶ See § 1, p. 14. The word used for century by Dionysius, $\lambda \delta \chi os$, though it indicates generally a military division, contains no specification of number. "Originally" indeed, Mommsen held in his Tribus (pp. 134, 135) "the military was identical with the political Host" but query whether in this detail.

¹⁶⁷ Dionysius, 4. 19. συνέβαινεν οὖν τοῖς τὰς μεγίστας ἔχουσιν οὐσίας ἐλάττοσι μὲν οδσιν εἰς πλείονας δὲ λόχους μεμερισμένοις στρατεύεσθαί τε πλείους στρατείας οὐδέποτε ἀναπαυομένους και χρήματα πλείω τῶν άλλων εἰσφέρειν. This greater frequency of military service is considered impossible by both Niebuhr and Karlowa, see Karlowa, i. p. 74. As to the heavier taxation, above, p. 520, n. 158.

¹⁶⁸ i. p. 83.

¹⁶⁹ Karlowa, i. p. 74.

gradual structure, owing its successive stages to the censor for the time being.

The conclusion that the political century is quite distinct from the military is, I admit, difficult to reconcile with the statement that the most valiant men in war were selected from the whole number to ensure the discipline of their respective centuries ¹⁷⁰. The general military object of the whole system which, as Karlowa says of the original meaning of the century, "shines through" (durchschimmert) the Servian one, may account for these civil or parade centurions.

Powers of comitia. As to the powers and functions of the great national assembly, there is reason to believe the judicial the earliest: the power of deciding on capital questions there is much reason to believe descended from early regal times: the electoral function reappears at least with the beginning of the republic: as to the legislative, perhaps a power of general legislation may be inferred from the prohibition of privilegia by the law of the Twelve Tables. But, in spite of previous constitutional compacts or of ordinances (leges) bearing the names of consuls or other leading men I still believe that the first legislative act of the people was the lex publica of the Twelve Tables which I am quite prepared to place at the reputed date of 449 B.C.¹⁷¹

Legio. This word scarcely seems to me to be fully explained by the brief note of Varro¹⁷². It implies a careful selection of the particular service for which the man is fit, and the posting him as hastatus, princeps or triarius, &c. That there were different rates of pay I think there is very little

¹⁷⁰ Dionysius, 4. 17 ad finem.

¹⁷¹ This date is accepted by Karlowa (i. § 17), Schöll, p. 1, Cuq, i. p. 126, and a majority of modern authors. It has been, of late years, vigorously criticised by Pais and Lambert, and as vigorously defended by Girard (Nouvelle Revue historique, xxvi, pp. 381 sqq.). I would refer to the article of the latter, L'histoire des XII Tables, for further discussion of the subject.

¹⁷² Varro, L. L. 5. 87.

doubt though I have no direct proof¹⁷³. It obviously dates from a later time than when all, of a comparatively limited number, were possibly obliged to appear in the field. It gave its name, as we know, to the famous division of the late Roman army, of which we have a very full account from Polybius¹⁷⁴ and a probable anticipation from Livy, à propos of the great battle of Mount Vesuvius which gave southern Italy to the Romans, but with which this system appears to have very little to do.

Supernumeraries, leves, accensi, velati, rorarii, hastati. The question naturally arises on the addition of legionaries mentioned above (p. 509), whether they were bodily enrolled at once, or only after a certain amount of preliminary service as supernumeraries, the latter appearing the much more probable course. That there always was a fringe of supernumeraries is obvious, though we do not hear much about them (see p. 510). Besides the regular heavy armed soldiers, with their graduated limitation of armature, down to the somewhat improbable slings and stones¹⁷⁵, and besides the carpenters and armourers, a considerable number οὐδὲν ἔχοντες ὅπλον is made to attend the ἔνοπλοι¹⁷⁶. This may of course mean not heavy armed¹⁷⁷: it more

¹⁷⁸ On Heerbildung what Mommsen has to say is to be found mainly in Msr. 3 ii. pp. 407—410, iii. pp. 103—106, 264, 448—451, 1071—1096, though some of these passages have rather to do with the partition of the legions between the consuls.

¹⁷⁴ Polybius, 6. 19—24. We may note that he calls the legion στρατόπεδον. The difficult chapter, 8. 8 of Livy, can scarcely represent the fullblown legionary system, in 340 s.c. 60 years before the Romans had had their first great lesson in scientific warfare from Pyrrhus: but it may indicate a beginning which culminated, so far as the military part, in the army of Scipio: the political part comes to an end about 312.

¹⁷⁵ Livy, 1. 43. Dionysius' σαύνια και σφενδόναι, &c., of those who were to serve έξω τάξεως, 4. 17, is more intelligible.

¹⁷⁶ Dionysius, 4. 17.

¹⁷⁷ It is only the fabri whom Livy (1. 43) makes to serve sine armis.

probably signifies those whom Cicero calls accensi¹⁷⁸. The technical meaning of this word has been mentioned elsewhere (p. 511)¹⁷⁹.

The gradual promotion to, or imposition of, a higher class of service, perhaps in accordance with age, becomes more probable if we consider the small proportion borne by the first-class soldiers of the legion (the *triarii*) to the total amount. The number of the former was fixed ¹⁸⁰, though seeing that the other, supernumerary (?), force might vary with the varying size of the legion ¹⁸¹, I cannot resist the conclusion, though I have no direct evidence, that the higher service was worked up to by a preliminary subordinate experience. Whether the note of *quality*, indicated by Lucilius in one of these subordinate positions, comes into account at all I cannot say ¹⁸².

Hastati and rorarii. I hesitate to regard the hastati as leves, at the same time I must admit that the account of the Roman hasta is by no means satisfactory. That the old lance, brittle in character, was replaced by a stouter weapon we learn from Polybius: whether this change in the cavalry was accompanied by an adoption of the Greek $\delta \acute{o} \rho \nu$ in the infantry, we are rather left in the dark 183. I can only say that it is probable.

Are any of the difficulties of this subject to be reconciled by an identification of the *rorarii* with the earlier *hastati*? I venture to think so, in spite of the general trend of Livy, 8.8¹⁸⁴. The young bloods of the army are here regarded as

¹⁷⁸ Cicero, de rep. 2. 22. 40. They are placed in the same category with velites, liticines, cornicines and proletarii (see Seeley², p. 83).

¹⁷⁹ Festus, P. p. 18. Accensi dicebantur qui in locum mortuorum militum subito subrogabantur, dicti ita quia ad censum adiciebantur. See Msr. ³ iii. p. 288.

¹⁸⁰ Polybius, 6. 21. 10. ¹⁸¹ ib. ¹⁸² See p. 527, n. 1948.

¹⁸³ Polybius, 6. 25. 5, 9.

¹⁸⁴ Mommsen, Tribus, p. 130, is not clear.

skirmishers, or rather almost as a forlorn hope¹⁸⁵. There is much in subsequent books of Livy to support the above suggestion, but I make it with considerable hesitation. In support of it may also be quoted an otherwise unnecessary mention of the former in a note of Festus on supernumeraries generally ¹⁸⁶.

On the principes¹⁸⁷ there is little to add. They are of a more mature age than the hastati, and succeed them in the attack. Both these bodies are said to wear the Roman "panoply" which is not very infallible as far as the large shield is concerned¹⁸⁸.

I will at least venture to assume that the hasta was a substantial weapon; being purposely altered to the Greek fashion¹⁸⁹. It does not appear to me to have been a missile, as the ordinary gaesum was. I must venture to differ from Polybius who gives the hastati the $\pi a \nu o \pi \lambda (a^{190})$, but I do not see how that is consistent either with the expression of Livy or with the undoubted function of this force. The hasta must be a tall and conspicuous weapon as the sign of auction. Gaesum, on the other hand, is according to Nonius¹⁹¹ a tenerum though according to Festus a grave jaculum¹⁹².

These somewhat variant dicta are possibly to be reconciled by the testimony of Polybius who recognises two kinds of $\dot{\nu}\sigma\sigma\dot{\omega}$. The light ones are like hunting spears ($\sigma\iota\beta\dot{\nu}\nu\iota a$). They are, in fact, a Roman improvement on the javelin of the savage, who tracks his quarry until it falls from loss of blood or exhaustion. The original flint-headed weapon is

¹⁸⁵ Compare Livy's prima from juvenum pubescentium with the language of Dionysius (4. 16) προαγωνιζόμενοι τῆς φάλαγγος.

¹³⁶ Adscriptitii, Festus, P. p. 14; see Festus, P. p. 18, which is rather a note on access: Varro, L. L. 7. 56.

¹⁸⁷ I can make no suggestion as to these relays. I can only suppose them to be men of note, for wealth or prowess, and not required as officers for the *triarii*. Polybius' style for them is a mere transliteration.

Polybius, 6. 23. 1, 2, 10.
 Polybius, 6. 25. 3.
 d. 6. 23. 1.
 Nonius, p. 555. Casa.
 Festus, P. p. 99.

replaced by a missile totally of iron, which is left, unreturnable, still sticking in the foe¹⁹³. In the heavier weapon to which Polybius devotes special attention I have very little hesitation in recognising the "stout Roman *pilum*," a formidable weapon, certainly not to be thrown away as a missile, with a head equal to the shaft, to which it is firmly clamped or lashed so that neither can be broken without the other (Polybius, l. c.).

In Seyffert's ridiculous picture in the Dictionary of Antiquities (Sandys, p. 491), the head would break off at the first blow; although this is taken exactly from Polybius' description and, perhaps, from a genuine original. I abide by Macaulay and take the *pilum* to have been no missile, but a fighting weapon.

Accensi, velati, velites. Festus makes the gratuitous statement that the accensi were called velati because they accompanied the army in civilian dress, vestiti, but unarmed ¹⁹⁴. Veles is quite a different word although connected in meaning: a passage of Lucilius, however, which bears evidently on inspection of weapons by a centurion, shews him as wielding the hasta in regular service or at least discipline ^{194a}.

Little remains to be said of the gradually decreasing armature of the Servian classes. It is so obviously fanciful that the general agreement on it between Livy and Diony-

¹⁹³ Cf. Polybius, 6. 23, 11, and 22. 4. This is the γαισος όλοσίδηρος of Pollux. 6. 21 (7, 156, Dindorf).

¹⁹⁴ Mommsen, Msr.³ iii. p. 283, accepts this unsatisfactory explanation of velati. On rorarii, see Corssen, Beit. p. 143, who rightly rejects the usual fanciful derivation. His own, from the root dru or the Greek $\delta\rho\alpha$ ($\delta\iota\delta\rho\acute{\alpha}\sigma\kappa\omega$) certainly has the etymological analogy of ros from $\delta\rho\acute{\sigma}\sigma\sigma$ in its favour—not much else. The rorarii have of course nothing to do with dew or showers. Neither has velati any connexion with veles which is usually considered akin to the root of volare.

¹⁹⁴a Ut veles bonus, sub vitem qui summicit hastas. I have adopted Scaliger's emendation for the corrupt subsit. See Festus, F. p. 309, sub vitem, this and 310, sub vineam, obviously indicate the centurion's inspection. Summicit I should translate "brings up." Müller reads subsisit.

sius¹⁹⁵ only points to some common source, whether Fabius Pictor or Varro¹⁹⁶.

Enough at least has been said to justify the expression "a fringe of supernumeraries" without descending to the men who bear the alternative of javelins, slings and stones, or coming to those who according to Dionysius were free not only from military service but also from any other state contribution¹⁹⁷.

Livy's armature, &c., then is represented by the legionary system (Livy, 8.8), to be inaugurated by the great and decisive battle of Mount Vesuvius (339 B.C.), but it is described more in detail by Polybius 150 years later. In his work (6. 23) is a minute account (c. 24) of the armature of the hastati, principes and triarii; very little of the physical qualities required of them, except that there are rather complicated arrangements for securing a fairly equal contingent for each of the four legions of which the usual levy consists 198. The final part of Livy's c. 8, appears merely to relate to the equal matching of the Romans with their Latin adversaries. But the word legio means more than any such matching or selection of antagonists 199.

Among other Servian supernumeraries, the fact of the trumpeters and buglers being treated as a separate body instead of being distributed over the whole has already (p. 499) been referred to as evidence that the Servian system was intended not as an army but as a muster or array. At present, taking into account the divergency between our

¹⁹⁵ Livy, 1. 43: Dionysius, 2. 16, 17.

¹⁹⁷ Livy, 1. 43. Quinta classis aucta, centuriae triginta factae, fundas lapidesque missiles hi secum gerebant. Varro, however, apud Nonium, 555. Peltae, quotes some poet for a more credible light-armed contingent. Qui gladiis cincti sine scutis cum binis gaesis essent, see above, pp. 485, 486, 524.

¹⁹⁸ Polybius, 6. 19, 20.

¹⁹⁹ e.g., as hastatus levis or triamius. As to the partial adoption of Greek armature, see Polybius, 6, 25, 9—11.

modern attempts at explanation, and the arbitrary fancy shewn in linking these bodies with one or another class, I am rather disposed to consider such linking as part of the imperfectly recorded contrivance for securing a majority in the comitia for the monied interest²⁰⁰, if not as being, together with the supernumeraries themselves, post Servian. Enough has been adduced to shew the material for the creation of new legions (see p. 509) particularly if supplemented by fresh drafts from the proletarii. When those drafts took place is a matter to be gathered partly from the scanty authorities henceforth at our disposal²⁰¹.

Exploitation of the populace. After the closure of the five class system there can be little doubt that the process of exploitation of the Roman populace (see p. 531) went on, for a considerable time, at much the same rate. Considerable drafts were accordingly made upon the hitherto immune proletarii: or, what is the same thing, the minimum fortune liable to service became considerably lower. Instead of Dionysius' 121 minae as the lowest limit of the fifth class 202, we have, in the time of Polybius, only those under 4000 asses who are "left out" or relegated to naval service 203. It would appear that at least 9000 persons previously exempt, had already been absorbed into active service. Having in his Tribus regarded these new drafts simply as general legionaries, Mommsen, in the Staatsrecht, appears to spread them over the 2nd, 3rd and 4th classes²⁰⁴. The process generally, I take, with Mommsen.

²⁰⁰ Msr.³ iii. p. 282 and nn. 1 and 4: Seeley², pp. 82, 83: Lewis, Credibility, i. p. 493.

²⁰¹ Livy fails us from 293 to 218 B.C.: Dionysius altogether in 443 B.C.

²⁰² Dionysius, 4. 17: Livy, 1. 43 (11,000): cf. Cicero, de rep. 2. 122, and Gellius, 16. 10. 10 (15,000).

²⁰⁸ Polybius, 6. 19. 3. See above, n. 108.

²⁰⁴ Tribus, p. 116; Msr. iii. pp. 250 sqq. This is part of his revision of Cicero's calculations which I do not well understand and shall not try to reconcile with the original authorities.

to have begun so soon as the military performances of Rome required a standing, and paid, army with the institution of a new military organisation, possibly 406 B.C., though it was more likely some considerable time after that before the rude militia service of the Regal period was replaced by the phalanx, as Dionysius calls it, or by something more definitely copied from a Greek model. The introduction of a more national Italian system, which is described as recently established in Livy, 8. 8, dates from a semi-revolutionary period (339-337 B.C.) in which the accounts of real constitutional or military changes are sometimes practically passed over by our principal authority for stories of Roman devotion or instances of inhuman military severity (see end of Livy, Book 7 and beginning of Book 8). Alleged military successes, however, do not obliterate the inferences, which we may fairly draw, of a considerable admission of the lower orders to the army, and the franchise, during this period, which is followed, in a short time, by the undoubted and important Censorship of Appius Claudius Caecus²⁰⁵ to which such weight is given by Mommsen. With the conclusion of Mommsen I practically agree—that the class and army system cannot be considered as settled before the Hannibalian war.

Hard things have been said of the aggressive and rapacious spirit of the Roman nation: it is only fair to hear their great poet's version of the better side coloured as it is by the arrogance which comes from all unlimited power²⁰⁶. Nor must we deny our meed of admiration for the admirable machinery in which that power was organised. I do not speak here of the individual legion or of the individual legionary, but of the superb efficiency of their military system, as a system; its powers of concentration and joint

 ^{205 312} B.C. Msr.² ii. p. 402, &c. Livy, 9. 29 sqq. See end of Periocha.
 206 Vergil, Aen. vi. 756 sqq.

action, which have always been the wonder of the world. The introduction of a fleet at all requires an enormous provision.

Occasions for draft on lower classes. The following is a brief summary of the principal Roman demands upon their surplus population and consequent probable lowering of the minimum liability for taxation and service. I must premise that my authority is; for Latin, Livy as far as his history holds out: for the lost books Freudsheim's supplement in Drakenborch's large edition; for Greek a somewhat hasty perusal of the earlier books of Polybius.

At the great battle of Sentinum, 295 B.C., where our main attention is distracted to the self-devotion of Decius, four legions were engaged²⁰⁷. Previous to this, important events had occurred, e.g., the surrender of the Fauces Caudinae, and the bad faith of the Romans²⁰⁸. In the following year Fabius professes himself content with a comparatively small levy of 4000 foot and 600 horse, though we hear directly afterwards of a second legion being left in garrison at Clusium with a strange story of Fabius' objection to a stationary camp²⁰⁹. In the lost 16th book must have come the great diversion of 4000 of the lower classes to the general purpose of naval service without prejudice to their employment on land upon emergency²¹⁰. Whatever truth there may be in the story of taking pattern from a stranded Carthaginian vessel, there can be little doubt about the extraordinary despatch with which the new Roman fleet was rigged out²¹¹ and the reality of the victory obtained in 260 B.C.

²⁰⁷ Livy, 10. 27.

which they repeated in the case of the Numantians and Mancinus, Livy, Epit. 56: Cicero, de Oratore, 1. 40; 2. 32: Florus, 1. 34: Mommsen, Hist. (Dickson, 1901), iii. p. 229.

²⁰⁹ Livy, 10. 25.

²¹⁰ Polybius, 6. 19. 3. Each ship took 300 sailors and 150 fighting men. But these must not be counted twice over.

²¹¹ Pliny, H. N. 16. 39: Polybius, 1. 20. 12, 13.

Subsequently in the important naval battle at Heraclea (256 B.C.) in which, however, the best of the land forces were engaged, and which in fact copied the arrangement of the legion²¹², the Romans achieved more success.

After the defeat and capture of Regulus 255 B.C. the Romans were obliged to make a fresh drain of 10,000 men upon their spare resources in order to renew their fleet: many of these however were volunteers from the regular army attracted by the prospect of a short and safe expedition²¹³. These hopes were, as we know, frustrated through the miscalculation and incompetence of the consul P. Claudius Pulcher, 249 B.C.²¹⁴: but this did not deter the Romans from persevering in the war²¹⁵: they had some consolation in the capture of an enormous number of elephants which were taken about this time and sent on a raft to Rome, where they were killed by the javelins of the populace²¹⁶.

The return of the captive Regulus, his dissuasion of the Carthaginian proposals, and his subsequent fate, are well known to all readers of Horace²¹⁷.

The fleet, by which this war was finally concluded, was due to the liberality of a private contribution among the chief Roman citizens²¹⁸. It consisted of 200 ships, which of course would require to be manned. For the terms of the final treaty see Polybius, 1. 62. 8, 9. In his summary of the first Punic war this historian reckons that the Romans lost 700 ships, the Carthaginians 500²¹⁹.

²¹² Polybius, 1. 26. 4—6. Note particularly the separation of the *prima* classis and the *triarii*. So far as I can see the *corvi* seem to have been mainly contrivances to facilitate boarding.

²¹⁸ Polybius, 1. 39. 15; 49. 1, 2, 5.

²¹⁴ id. 1. 51. 8. ²¹⁵ id. 1. 52. 4. ²¹⁶ Pliny, H. N. 8. 6.

²¹⁷ Horace, Od. 3. 5. 13—56: Cicero, de Off. 3. 27. The reprisals narrated in Gellius, 7. 4, are enough to cast some doubt on this celebrated story, Mommsen, Hist. (Dickson, 1901), ii. p. 184.

²¹⁸ Mommsen, Hist. ii. p. 194: Polybius, 1. 59. 7.

²¹⁹ Polybius, 1. 63. 6.

The next 20 years are mainly taken up with what Mommsen calls the extension of Italy to its natural boundaries, i.e., the subjugation of the northern tribes²²⁰.

With the capture of Saguntum by Hannibal begins the second Punic war, in which the nadir of the Roman fortunes and the corresponding largest drain upon their yet uncalled up classes is reached. It is unnecessary to trace the earlier victories of the Carthaginian general. After their great defeat at Cannae, the Romans, the anger of the gods being supposed to be appeased 221 by strange and inhuman sacrifices—amongst other things by the discovery and punishment of vestal incontinence—applied themselves vigorously to practical measures.

A levy was made going below the usual age for military service: youths of 17 and under were enrolled, making up a total of four legions and a thousand cavalry. These may possibly correspond with Mommsen's "last legions": of his classiarii we shall hear presently.

A regular naval service had apparently been established in the first Punic war, for we read of a *legio classis* as already existing in this fateful year of Cannae and of 1500 men already enrolled who were sent on at once for the defence of Rome²²².

1. One of the first consequences of the battle of Cannae was as we see the holding of a levy at which youths of 17 and under were enrolled²²³. This considerable interference with the old Roman parental power, Hiero the king of Syracuse attempted to extend in order to secure his son's adherence to the Roman alliance, by means of tutores with a special commission, but without success²²⁴.

²²⁰ Mommsen, Hist. ii. pp. 203-230.

²²¹ Livy, 22. 57. Placatis satis ut rebantur. An unusual piece of scepticism on the part of this usually orthodox writer.

²²² Livy, ib. 223 Livy, ib.

²²⁴ id. 24. 4. Assuming that the principles of Roman law were followed

2. A much more questionable measure than the enrolling of citizens under the military age is the addition, on the same occasion of 800 volones²²⁵. This was a body of sturdy slaves, who were enrolled (it may be supposed with a promise of their liberty) on the mere enquiry if they were willing to serve in the army. Macrobius²²⁶ makes these men engage to fight pro dominis which looks as if the ownership survived. Perhaps the owners were Roman proletarii, who might otherwise have had to serve personally²²⁷.

On this non-Roman principle of substitution for the old personal service I need not dilate further. Enough has been said to account for the great difference, pecuniary and otherwise, between Dionysius and Polybius. We find accordingly in a later book of Livy a distinct impost laid upon the richer citizens who were obliged 223 to furnish, for manning a new fleet, so many nautae (probably slaves) per hundred thousand of income, with their keep and pay. These compulsory substitutes cast a little doubt upon the voluntary character of the previous contribution which Polybius records and on which Mommsen dilates with so much satisfaction. But the most remarkable instance of the straits to which Rome was reduced, and the drain on her resources, is to be found in the almost incredible story of the volones.

I pass to what Mommsen calls the extension of Italy to its natural boundaries. However "natural" this might in Sicily, I consider that this passage is conclusive against a popular opinion that a tutor is not concerned in the moral training of his ward.

²²⁵ Livy, 22. 57: Festus, P. p. 370, s.v. Whether they were "commandeered" or purchased from the owners we are not informed. In either case the prospect of liberty probably held out to them was an equal interference with the rights of property.

²²⁶ Macrobius, 1. 11. 30. Bello Punico, cum deessent qui scriberentur, servi pro dominis pugnaturos se polliciti in civitatem recepti sunt, et Volones, quia sponte hoc voluerunt, appellati. According to Livy (ib.) they are *empta*, bought out and out.

227 A delectus servorum is spoken of again in Livy, 23. 14

228 Livy, 24, 11.

appear in Roman eyes, the actual result is much of a piece with the earlier aggrandisement of the nascent republic.

In this case, however, from the general ill-defined terror of a Gallic invasion, Rome succeeded in posing as the champion of Italy, and commanded the assistance of a confederate body of the very persons whom she was really reducing under her sway. The impending horde of Transalpine Celts is called in the Fasti by the name (which now makes its first appearance) of Germans²²⁹. Accordingly the very large force (50,000), which on the authority of an eyewitness²³⁰ (Fabius Pictor), followed the Roman standard on this occasion, must not be considered as drawn entirely from Roman sources. Amongst other things it necessitated the addition of new tribes which took place from time to time after, as also before, the reform of Appius, until the number was closed by the final Velina and Quirina²³¹.

In the brief sketch of the principal occasions in the most critical part of Roman history for the enrolment of persons not previously liable for personal service, which is practically a continuation of the consideration of the evidence as to a class or plural classes treated on pp. 488 sqq., it is quite possible that important events have been passed over. The sources of information are various and not always particularly trustworthy. My principal authority is Polybius, with whom, it will have been seen, I do not, in all cases, agree.

²²⁹ A probable fancy of Augustan compilers. Mommsen makes out the name to be a Celtic word signifying "criers." It is more probably a word formed with the same prefix, meaning warlike, as in the first line of Beowulf Gar-dena.

²³⁰ Entropius, 3. 5. There is considerable discussion about the individuality of Fabius Pictor. Teuffel (Warr), i. p. 169. 2. I give the testimony of Eutropius as to his personal service, in the Insubrian war, for what it is worth, id. ii. § 415.

²³¹ 241 B.C., Livy, Ep. 19. Mommsen, Msr.³ iii. p. 172, n. 9, has rather a fanciful reason for this closure of which, however, he suggests a possibly later date (223 B.C.). I cannot trace any connexion of contemporary events with either date. The great assignment of lands by Flaminius took place in 232 B.C.

Mode of actual enactment. In the changes most directly to be connected with the name of Servius (under which, be it remarked, I do not include the five classes), there is little which might not be fairly referred to a powerful administration in the hands of an autocratic monarch. registration, the division into landed proprietors and others, the muster for service, and the elementary formation of a national army are fairly within the competence of a generalissimo and head of the treasury. The regulation of the forms of mancipium, and their requisition, as essential to the transfer of landed property and its appurtenances, though scarcely to be ticketed with the modern phrase "a Rule of Court," are quite reconcileable with the idea of an ordinance by a sovereign, who is the Fountain of Justice, like our Henry the Second. The Acts in Law growing out of that form, which are briefly suggested in Appendix II on res mancipi, and which resulted in important changes in the private law of person and property, are referable to the modification of mancipium by the law of the Twelve Tables, and will come more properly and conveniently under that legislation; although they are mostly matter of Custom, or rather Practice, not more remarkable than changes which grew up similarly in our own Real Property Law. changes are often represented as the result of direct legislative enactment, of which there was probably little or nothing before that lex publica232 the Twelve Tables.

Certain less credible projects of fundamental reform also attributed to Servius relate mostly to public or what we should style Constitutional Law.

Besides a vague suggestion that this king proposed to lay down even his mild and tempered authority because it was monarchical²³³ we have the direct statement that the

²³² See Jurisprudence, i. pp. 309, 321.

²⁸³ Livy, 1. 48. Id ipsum tam mite ac tam moderatum imperium tamen, quia unius esset, deponere eum in animo habuisse quidam auctores sunt.

first two Consuls were created in accordance with the memoranda of Servius Tullius²³⁴.

If there is any authority for the statement of Livy, Servius may have contemplated a representation of the two stocks composing the Roman populus, which it was his aim throughout to unite, as it was probably, though in a less pronounced manner, that of his predecessor. The probable objects of the dual government, which did in fact succeed the monarchy, are viewed otherwise by Mommsen: but to this subject I shall return more particularly in speaking of the beginning of the Republic.

Other measures, actual or projected, attributed to Servius, resemble those of later champions of "the people" with such suspicious exactness that we may fairly set them down as inventions of our historians²³⁵. Such are, the payment of debts, for distressed debtors, out of his own pocket, the engagement to forbid the pledging of personal liberty for the future²³⁶ and the lodging of the "homeless" Romans on the Esquiline²³⁷. In the redistribution of public lands²³⁸ we probably have a traditional account of an actual proceeding, quite enough to explain an aristocratic reaction, of which an able and unscrupulous usurper would naturally avail himself to establish a pure despotism, in which any constitutional developement is obviously suspended. The tragic end of Servius and the parricidal frenzy of Tullia may quite well be historical facts, though possibly the irreverent

Dionysius, 4. 40. παρέσχε τε πολλοῖς ὑπόληψιν ὡς, εἰ μὴ θᾶττον ἀνηρέθη μεταστήσων τὸ σχῆμα τῆς πολιτείας εἰς δημοκρατίαν.

²⁵⁴ Livy, 1. 60. Duo consules...ex commentariis Ser. Tullii creati sunt. In the long harangue which Dionysius inflicts on us, there is no word about any such memorandum of Servius. Brutus declares an interrex to preside over the election κατά τοὺς πατρίους νόμους, and he and Collatinus are elected without remark.

²³⁵ Dionysius, 4. 9, 10.

⁹³⁶ id. 4, 10.

²³⁷ id. 4. 13 and above, p. 504.

²³⁶ See generally also § 17, p. 568.

etymologer may give the homely explanation of Slippery Street to the steep descents of the Summus Cyprius Vicus²³⁹.

The scheme described above is represented to us as the deliberate intention of Servius²⁴⁰, and Lewis assumes that the whole system was, at a comparatively early period, traced to him. This I cannot accept and I come lastly to the arrangement by which this object was, in fact, attained in the system considered as a political assembly. For that it early became such is clear²⁴¹.

This result was, we are told, effected partly by the order in which the classes were called upon to give their vote, partly by the distribution of the voting power among them. On the former subject I shall have more to say when I come to the discussion in detail of Appius' reform.

A reform, finally, in the administration of private justice (on contract and delict) is mentioned as introduced or projected by Tullius, but abolished by his successor and only recalled into use by the first consuls²⁴². This subject will be treated partly under the head of the *Regiae leges* (sacramentum) and partly in the history of the establishment of the

²³⁰ Vicus sceleratus. Livy, 1. 48. See for the attribution to Servius of the old rule Si parentum puer verberit, &c., Festus, F. p..230, Plorare. On the locality, Burn, Rome and Campagna, p. 231. Curtius, p. 373, appears however to connect scelus rather with the moral meaning of schula than the physical one of slip under $\sigma\phi\alpha\lambda$ —, &c.

240 Dionysius, 4. 20. ὁ Τύλλιος ἐπὶ τοὺς πλουσίους μετέθηκε τὸ τῶν ψήφων κράτος.

Livy, 1. 43. Non enim, ut ab Romulo traditum ceteri servaverant reges, viritim suffragium eadem vi eodemque jure promiscue omnibus datum est: sed gradus facti, ut neque exclusus quisquam suffragio videretur, et vis omnis penes primores civitatis esset. See Lewis, Credibility, i. pp. 500—502.

²⁴¹ The "comitatus maximus" where alone proceedings could be taken affecting the caput of a citizen (Cicero, de Legibus, 3. 4. 11, 19. 44), i.e., to which appeal was allowed, as of right, at the beginning of the Republic was clearly the comitia centuriata (Twelve Tables, 9. 1. Dig. 1. 2. 2. 16). Strictly this was only a judicial assembly.

²⁴² Dionysius, 4. 13, 25, 43 and 5. 2.

Republic. The institution of private judices, which is represented as a diminution of the royal prerogative ²⁴³, goes, according to these stories ²⁴⁴, much further than the actual reform which there is some reason to connect with the early Republic. This will be treated hereafter under the heads of judicis postulatio and condictio: but any idea of plebeian judices appears certainly to have been deferred sine die. From the premature tradition of a Code ²⁴⁵ we can infer the grievances which were sure to arise naturally from administration of a customary law by a close order; of which the only possible remedy was repeatedly claimed, bitterly opposed, and at last applied, only in a patchwork fashion, at a period of disorder nearly approaching revolution, in the imperfect codification of the Twelve Tables.

As regards Servius' alleged distribution of land (p. 504), probably the last practical measure, before the civil dissensions of the Gracchi, for the division, among the poor, of conquered land, was that which took place according to Cicero in the year 228 B.c., according to Polybius four years earlier²⁴⁶. The settlers were among the poor, hastily gathered together in the dark days of Hannibal's earlier successes: but the history of this particular reformer (Flaminius) who ends, as we know, by becoming the scapegoat of Thrasymenus (217 B.C.) is too long and intricate to treat here.

On the original Servian reform I have one last difficulty of Seeley to mention of which perhaps too much has been made. This difficulty regards the voting of the centuries in the half tribe.

That the centuries did vote as one body is proved, as has been said, by inscriptions which speak of the mass as a *corpus*. The right of first voting is accordingly said to fall, e.g., to

245 id. 4, 25.

²⁴⁶ Cicero, de Senectute, 4. 11: Polybius, 2. 21.

the tribe Aniensis of the juniors²⁴⁷. That all the centuries in a half tribe should vote alike, is therefore one of the difficulties which have to be explained, when we come to discuss the reform of Appius as a principal question. At present I confine myself to questioning the Servian character of the whole division into older and younger (above, pp. 486 sqq.). I refrain from quoting Livy, 24. 7, 215 B.C. This passage, which is said by Mommsen (Msr.³ iii. p. 291, n. 2) to be the first reported case of the reformed order, he contrasts with 10. 22. 1, upon which, according to him, no justifiable reliance can be placed (l.c. 291, n. 1). The long interval after the date which he gives to Appius' reform (312 B.C.), is of course due to the loss of Livy's 2nd Decad. About the juniors regularly constituting the prerogative, see below, p. 541, and Msr. iii. p. 274.

I am afraid that, in these somewhat scattered notes upon the Servian Constitution, many disputed points must be left unsettled, and what conclusions can be drawn must be of a general and on the whole of a negative character. so-called Servian system was not in its entirety the work of one farsighted man. Its general object is stated at pp. 483, 506 and 513, which however was maintained and carried out by a succession of statesmen mostly acting through the great powers which were gradually obtained by the censors. That the idea of a census and the registration was Servian I have no hesitation in believing: the tribal division is also clearly attributable to him. But its modification in the hands of Appius and Fabius is equally certain, while the class system is a matter of gradual growth according to ascertainable Roman emergencies: care being undoubtedly taken to preserve the general timocratic character of the comitia as a political assembly by the artifice of a successive diminution

²⁴⁷ See an implied suggestion of Seeley², p. 86, but compare Mommsen, Tribus, pp. 95, 96.

of the voting groups allowed to each successive levy on its admission to political activity. The division into seniors and juniors I must persist in considering, in spite of ancient tradition, non-Servian. This is not merely on account of the silence, or implied contradiction, of Livy²⁴⁸, and the late learning connected with the word and idea duicensus but on account of the rare occasions which there seem to have been for garrisoning Rome. That the Juniors as the men engaged in active service, should, when the division was made and the assembly had assumed a political character, be the persons to be asked for their vote seems natural²⁴⁹.

The principal vote being recorded as, for instance, sors Aniensis juniorum, all the other centuries are generally understood to follow unanimously. This, although borne out by inscriptions, is not very likely, as it is quite possible that there might be differences of opinion within the same half-tribe, and conflicting votes. Professor Seeley is of a different opinion, for which strong reasons may be alleged. Practically he regards all the centuriae, say juniorum, as constituting one whole and the centuriae seniorum as constituting another. Indeed it is difficult to avoid recognising, in the primo vocatae, who so often accompany the centuria praerogativa in Livy, a supplementary attendance from the same half-tribe. That the half-tribe is expressly styled a corpus juniorum, or seniorum, in inscriptions (Mommsen, Tribus, p. 76), is a strong testimony to the same effect. As to the one body taking counsel with the other (see Livy²⁵⁰, it is mainly interesting as affording Livy an opportunity of making one of his little sermons about the deterioration of modern manners.

²⁴⁸ Livy, 1. 43: Dionysius, 4. 16, 17.

²⁴⁹ See Msr.³ iii. p. 274. ²⁵⁰ Livy, 26. 22.

APPENDICES TO § 16

I. PROPORTIONS OF THE CLASS FORTUNES

A Roman monetary standard, even in copper, probably did not come into existence before the Twelve Tables²⁵¹: in silver not earlier than the censorship of Appius Claudius Caecus in 312 B.C. I must not however anticipate the history of that reform, which is frequently considered to be the *end* of the old class system in its integrity as a matter of political supremacy, determined by a scale of fortunes, but see above, p. 521.

As far as numbers go, it has already been remarked, p. 497, that the absolute amounts given by our authorities for the five classes are too high even for a later time than that of Servius²⁵². For our present purpose it will be sufficient to take their traditional proportions, which Mommsen puts roughly at 25, 10, 5 and 2½ jugera: below 2, the citizen probably did not count as a landholder at all²⁵³.

The main original division into assiduï a body regularly liable to be called out, at least for military training, and proletarii who were not so liable, probably at first recognised, for the former, only persons of considerable means. Mommsen appears to identify this fortune with the Teutonic hide; but this seems to me to be explaining ignotum per ignotius.

²⁵¹ Usually put at 449 s.c. As to the fact of the coinage see Mommsen's Gesch. Münz. p. 175. Copper of a certified quality was no doubt a medium of exchange by weight; earlier, see p. 508.

²⁵² The actual minima of Livy and Dionysius, reckoned in *asses*, are (i) 100,000, (ii) 75,000, (iii) 50,000, (iv) 25,000, (v) Dionysius 12,500, Livy 11,000.

²⁵⁸ Plutarch, Publicola, 21, speaking of the grant to the Claudii, makes the smallest lot, for Appius' men, 2 jugera: the largest for himself, 25. Huschke, whose views are, in the main accepted by Mommsen, rates the 2 acres at 10,000 asses. The English rendering of Mommsen's Kleinstelle I do not know.

I will assume this minimum for the first class to be some 20 jugera²⁵⁴.

As to the question of classis or classes we have, it is true, a little, but a very little, evidence from antiquarian authority. I mean, of course, the question of the first class ever being taken to represent the whole five.

The classici testes of Festus²⁵⁵, the witnesses to the Roman will, may mean persons taken exclusively from the first class: they may mean persons taken one from each of the whole five. The latter supposition is of course connected with the vague idea of lex meaning always a national enactment. The passage of Festus furnishes no ground for deciding one way or the other.

As to the money estimations of Dionysius and Livy I myself cannot see much reason why, with due allowance for considerations of symmetry, they may not have represented the successive qualifications to which the claim for service was actually reduced in the times of Rome's trouble. The Augustan historians had contemporary authorities to refer to:

²⁵⁴ See Mommsen, Msr.³ iii. p. 248. The controversy as to the size of the Hide, cannot be considered as finally settled even by Maitland's exhaustive treatment in "Domesday Book and Beyond." He concludes in favour of the "big hide" of 120 acres, and recognises also a continental "big hide." But, to understand Mommsen, on the Servian system, we must take him to have had in mind the smaller hide of many other authorities—between 20 and 30 acres. Hufe, it may be interesting to note, is considered by Kluge cognate with κάπος, a garden plot (=hortus). Hide, originally higid, is apparently connected with words meaning household. See Skeat, s.v. and hind; also Bede's locum unius familiae received by Hild from Aidan (Hist. Eccl. 4. 23).

Of one thing I feel practically confident, that if translated into a landed qualification, that must more probably have been into multiples of a Roman minimum than into fractions of a Teutonic: there is not the least reason to suppose an European extension of the hide so far as Italy, and the remote philological connexion of $\kappa\hat{a}\pi\sigma s$ with hufe is too slight a foundation for any serious identification.

²⁵⁵ Festus, P. p. 56. Classici testes dicebantur qui signandis testamentis adhibebantur. Though really part of the original mancipation they afford no proof of the contemporary existence of five classes. Girard⁵ indeed

in so much as they had to rely upon tradition I can scarcely believe that the memory of the dark days of 150 years ago can have as yet faded from the minds of men who could write as Horace wrote of the time when the dread African swept through the cities of Italy like a fire through the dry stems of the forest or the fierce East wind over the Sicilian waves²⁵⁶, not to mention the terrible retribution exacted from Capua.

II. RES MANCIPI

Publicity of alienation, p. 545. Witnesses to mancipatio, ib. Whether confined to res mancipi, 546. Results, 548. Gaius on mancipatio, ib. Ass signatum, 551. Stipendium, 552. Imaginaria venditio, 554. Absolute character of mancipatio, ib. Guarantee against eviction, 555.

There are of course, certain fundamental conceptions lying at the core of all human agency which are to be taken into account in dealing with the Roman citizen:—e.g. volition and capacity to do and endure. With these directly I have nothing to do. The Roman citizen is classed, in the Servian system, merely by his material belongings, and it is with regard to them that the distinction of which I am about to speak must be solely considered.

The ideal and normal condition of the old Roman citizen was agricultural; it is as bearing on that condition that the distinction of property as res mancipi or nec mancipi is to be regarded. Land, held in private ownership or occupation, with the stock and appurtenances pertaining to its agricultural cultivation, known as his familia (see Jurisprudence, p. 544) constituted the main property of the Early Roman, and as such, was entered under the Servian system in his name. It is probable that alienation of this kind of property, away points out (pp. 286 and 287, n. 2), citing G. 1. 119, that they were not specifically five, but not less than five.

²⁵⁶ Horace, Odd. 2. 12; 3. 6. 36, &c.

from heredes, was not allowed: on the other hand, alienation inter vivos had already become competent to the owner.

It was obviously necessary, for the purpose of correct registration, that alienation of any part of this property should be public. For each alienation therefore the form of mancipium, probably pre-existent, at least for moveables, was now imperatively required and at the same time made subject to certain solemnities and a special form of attestation, of which I shall speak further in the later part of this appendix²⁵⁷. The medium of exchange was, as yet, copper passing by weight, and the traditions which represent Servius as the author of weights and measures, and of marked or shaped copper are in favour of some features of regulated mancipation being part of the system which bears his name²⁵⁸.

The witnesses to Mancipation. This question has been considered above and the small amount of light thrown on it by the passage of Festus discussed. A good deal of mistaken reasoning, as to the lex of the mancipium being a statutory enactment, from the five witnesses representing the people, appears to me to be based upon a purely modern idea and may indeed be considered as exploded. Even that of a public guarantee, which may possibly have entered a little into the testamentum comities calatis or the arrogatio 259

²⁶⁷ The general character of res mancipi appears from this passage of Ulpian (19. 1). Mancipi res sunt praedia in Italico solo tam rustica, qualis est fundus, quam urbana, qualis domus: item jura praediorum rusticorum velut via iter actus aquae ductus: item servi et quadrupedes quae dorso collove domantur, velut boves muli equi asini: ceterae res nec mancipi sunt. The "rights" no doubt come later. Mommsen indeed puts "moveables" first, as more capable of literal mancipium (Msr.² ii. p. 391, see my § 5A, p. 211). Cuq, i. p. 249, questions the use of mancipation for land, even in the time of the Twelve Tables.

²⁵⁸ Pliny, H. N. 33. 43. Mommsen, History (Dickson, 1901), i. p. 195, n. 1. See below, n. 289.

 $^{^{250}}$ § 10, pp. 374 sqq. See Karlowa, RRg. ii. p. 850. Contra Jhering, i. pp. 145, 146 and ii. 4 p. 606.

cannot be predicated of the ordinary mancipium. The witnesses were not simply silent onlookers²⁶⁰; they were, at least originally, parties to the transaction, which they had stood over²⁶¹, and had to back or support it if necessary²⁶²: but merely as private individuals. The origination of so many classes is now supposed to be later than the time of Servius; the number five of the grades of fortune to be independently accountable for; and the lex has been otherwise explained, see Jurisprudence, p. 309. Whether or no there ever were a body specially known as the class, which is to some extent indicated by Gellius and Cato²⁶³, the wills in question will stand as fiduciary mancipations independently of any question as to who were the classic testes.

The mode of assurance which is treated with mancipation by Gaius—in jure cessio²⁶⁴ is probably of later development, but was equally attended and recorded by circumstances of publicity.

A question, not of much moment, has been raised about mancipation—whether it was confined to res mancipi, or applicable to other articles as well. The former opinion is held by Girard and Roby²⁶⁵, being supported implicitly by Cicero and Ulpian²⁶⁶. There is nothing conclusive in the form and circumstance of attestation, and there are apparent evidences the other way, e.g., the pearls of Lollia Paulina²⁶⁷ for which she could refer to the mancupatio in

260 Muirhead, Gaius, p. 108, n. 7.

²⁶¹ Backer is perhaps the meaning of their old name *superstites*. See Festus, F. p. 305, s.v.

362 Jhering, i. 5 pp. 141, 144; ii. 4 pp. 544, 545.

568 See p. 500: we may add Festus, P. p. 113. Infra classem significantur qui minore summa quam centum et viginti millium aeris censi sunt.

264 Ga. 2. 24.
 265 Girard⁵, p. 291, n. 1: Roby, R. P. L. i. p. 426.
 266 Cicero, Topica, 10. 45 (quoted in full by Roby): Ulpian, 19. 3. Mancipatio propria species alienationis rerum mancipi.

³⁶⁷ Pliny, 9. 117. Lolliam Paulinam...vidi zmaragdis margaritisque opertam quas summa quadringenties HS. colligebat, ipsa confestim parata mancupationem tabulis probare.

her accounts. In the case, on the other hand, of the donatio Artemidori, the funeral urns are somewhat lamely explained, in Girard, by the suggestion that an act, null as mancipation, might take effect by tradition²⁶⁸. He is also driven to the suggestion that anciently res nec mancipi were not capable of Quiritarian property; which appears to me to be a reductio ad absurdum. The existence of such ownership is distinctly recognised by Karlowa²⁶⁹, though his reasoning in the particular instance relates to special cases of its transfer: nor can the obiter dictum of Cuq270 as to "things which ordinarily are not considered objects of property" be quoted in support of Girard's suggestion given above. Whether, in the passage from the Topica, Cicero shared in the misunderstanding expressed in the suggestion that anciently res nec mancipi were not susceptible of Quiritarian property at all I do not know. Mommsen certainly held in his History²⁷¹ that this was a misunderstanding of later ages, which put upon the rule, that certain articles must be transferred by mancipation, the construction that such articles alone could be so transferred. Possibly Cicero was merely thinking of the general rule that any mancipation ipso facto involves a guarantee. I should be disposed to hazard the statement that any object in which private property is recognised by Roman Law might be alienated by mancipation, although this is essential to res mancipi only 272.

²⁶⁸ See Bruns⁷, i. p. 335: Girard⁵, p. 291, n. 2. In this case it may be noted that the gift involves permanent access to the monumentum which is evidently in agro Italico: the ollaria and cineraria are attached to a plot or site which is a true res mancipi. But the case is different with the pearls of Lollia Paulina. In all such cases of donatia the sale is nummo uno to avoid, or render nugatory, the guarantee dupli.

269 Karlowa, ii. p. 418. 270 Cuq, i. p. 93, n. 1.

²⁷² Ga. ii. 22 is in part a restoration but justified by Ulpian, 19. 9, 10, and Boethius, on Cicero's Topica, 5. 28.

²⁷¹ Hist. (Dickson, 1901) i. ch. 11, p. 162, n. That, in substance, mancipium may have existed previous to Servius and may have been confined to moveables, I have already admitted, p. 211.

Results. Of the results of the Servian system in this particular direction, of mancipation, some have been already treated in speaking of the comitia curiata. In fact, the testamentum comities calatis of the centuries, and the testamentum in procinctu, seem to follow directly, and almost necessarily from the new organisation, see p. 446. I shall have hereafter to speak more particularly of the important indirect results which follow from the greater formality and importance given to mancipation, when it was recognised as the conveyance for all property entered on the census roll, and its effects extended in a fiduciary direction by the Twelve Tables.

Mancipium must have meant originally a physical taking with the hand. That it ever meant the acquisition of manus, in the metaphorical sense of control I do not believe 273. The explanation of Gaius "quia manu res capitur" 274 is clearly borne out by usucapere, probably by the antithesis of nuncupare (see below on vi. 1 of the Twelve Tables); and in the exceptional case of landed property being mancipated in its absence (Gaius and Ulpian, Il.cc.) it was no doubt once represented by a clod or turf, as certainly in vindicatio, probably in in jure cessio²⁷⁵.

Jhering suggests (ii.4 p. 540, 541), as an intermediate stage of developement, a double mancipium, or taking, by way of simple exchange, the amount of bronze, or copper, for the slave. This may be left as merely a possible fact. We have no proof of it and may come at once to the important passage of Gaius on mancipatio²⁷⁶, from which we can perhaps infer previous stages in the history of this primeval conveyance.

Here every word and form is significant. Of the hand²⁷³ This view is maintained by Muirhead, p. 60, but see Goudy's note 23.
Gaius, 1. 121.

²⁷⁴ Gaius, 1. 121.

²⁷⁵ id. 4. 17; 2. 24.

grasp mention has been already made. On the strength principally, I think, of the rem tenens, in Gaius 4. 17, Jhering objects to an emendation of the Ms. reading which is generally adopted, i.e. aes for rem in Ga. 1. 119²⁷⁷. Now a man has two hands and there seems to me no absurdity or impossibility in his seizing the slave with one, at the same time that he taps the scales and gives the emblematical bit of bronze to the purchaser with the other²⁷⁸.

This regulated and required form of mancipium (which word, it will be observed, is used by Boethius, l.c., in the sense of the man sold) is the mancipatio described by Gaius.

In the words hunc ego, &c. the acquirer's assertion that the slave is his ex jure Quiritium may refer to the rough right of conquest²⁷⁹ though it has been shewn above that mancipation was not, at least in later practice, confined, any more than Quiritary ownership, to res mancipi. This acquisition Jhering (l.c.) is right in regarding as the primary idea, but it is directly qualified by the succeeding words, in which we see how conquest is replaced by purchase (purchase in the modern sense). Emptus no doubt originally meant simply taken²⁸⁰ but, in this context, it must mean "taken for a price," i.e. bought.

277 Jhering⁴, ii. p. 572, n. 766^a. The emendation is based on Varro, L. L. 9. 83, assem tenentes, and Boethius, in Topica, 5. 28, who writes Is, qui mancipium accipit, aes tenens ita dicit. Hunc ego hominem &c. isque mihi emptus est hoc aere aeneaque libra. Deinde aere percutit libram idque aes dat ei a quo mancipium accipit, quasi pretii loco. The Ms. reading however is preferred and retained by Muirhead in his edition of Gaius, as also by Abdy and Walker. Muirhead cites inter alios Isidore as on his side (Origines, 5. 25. 31): Mancipatio dicta est quia res manu capitur: unde oportet eum qui mancipio accipit comprehendere id ipsum quod ei mancipio datur. But I prefer the philosopher's testimony to that of the Bishop.

²⁷⁸ Jhering's objections, therefore, ex absurdo, seem to me, as often, absurd themselves. For the tapping the scales, and the direction of the libripens "raudusculo libram ferito"—a rubric antiquated in Varro's time (5. 163)—see Festus, F. p. 265, Rodus. For the giving of the raudusculum to the vendor

see Boethius, l.c. in note 277.

²⁷⁰ Gaius, 4. 16. See Jhering⁴, ii. p. 543.

²⁸⁰ Festus, P. p. 76, Emere and p. 4, Abemito.

Emptus est, due to the same passage in Boethius, is, in my opinion, a reading much preferable to esto not only on account of the authority referred to but from its better agreement with the preceding words²⁸¹.

Aere is translated by Muirhead "with this as" and the aes of the old mancipation is no doubt identified both by Varro and Festus with the coin that was most probably used for the same purpose in later times. But the original raudusculum was certainly as appears from Festus' authorities and from the derivation of the word282 a piece of rough or unwrought bullion. This fact must be coupled with the expressions aere and aes which Gaius carefully employs instead of the asse and assem occasionally substituted by other writers on the same transaction²⁸³. His remarks in 1, 122 are very interesting and sufficiently prove that the form of mancipatio dates from a time when there was no coined money but the copper, or bronze, which was the medium of exchange was reckoned by weight²⁸⁴. How the Twelve Tables prove that there was no coined money before them, is not quite clear at first sight. The use of bare numerals in that Code (e.g. viii. 3, 4) may shew that there was then only one denomination, but whether that was the as, or the pound of copper remains an open question. I accept, however, Mommsen's view. The legends about Servius given below (nn. 288, 289)

²⁸¹ I cannot therefore agree with Karlowa's view of this clause as being not assertorisch but a Willenserklärung, ii. p. 369. See also Jhering⁴, ii. p. 538, n. 106,

²⁸² Cited under Rodus, Festus F. p. 265. For derivation Corssen, i.² p. 34; see also Jhering⁴, ii. p. 539, n. 708.

²⁸³ The confusion is a very old one. I believe that Professor Ridgeway is the first to have derived the true meaning of the original as (assis cognate with asser), i.e. a rod or bar of copper one foot in length divided into twelve parts called *unciae*. Ridgeway, pp. 351, 354.

²⁸⁴ Expensa, impendere, the libripens himself may be quoted in other instances besides Gaius' dispensatores. Pondo is apparently an ablative, in weight, Roby, Grammar (1881), i. p. 126.

probably indicate some previous guarantee of quality or purity by mould and device. This is ingeniously suggested by Jhering to be the object of the tap, i.e. to discover soundness of metal by its ring or tone²⁸⁵. A memorial of the ancient payment by weight, is the old balance kept in the temple of Saturn²⁸⁶, for so many centuries the state treasury²⁸⁷.

Aes signatum. Traditions connect Servius generally with the introduction of weights and measures²⁸⁸ and more particularly with the marking copper with figures of the sheep and the ox²⁸⁹. All this is, I think, compatible with his having simply originated some system of indicating purity or quality of metal, without going into detail of the as and its divisions which there is reason to place later (above, p. 550). Professor Ridgeway in his endeavour to establish an original cattle currency for Italy^{289a}, most ingeniously connects the known equation of an ox = ten sheep with some of the moulded (not stamped) ingots which bear those figures and which he supposes to indicate roughly the comparative value of the stock. I have only two objections to make. 1. The ingots, or slabs, such as that figured by Prof. Ridgeway, p. 356, have always

²⁸⁵ Jhering⁴, ii. p. 539, n. 707. This is perhaps credible for a bronze coinage, but query whether for raw copper which is represented as the first medium of exchange.
286 Varro, L. L. 5. 183. It is there called a trutina.

²⁸⁷ Plutarch, Publicola, 12: Burn, Rome and Campagna, p. 95.

²⁸⁸ Servius...mensuras et pondera constituit. Mommsen, in his History (Dickson, 1901), i. p. 195, refers to some tradition of this general kind, and, in his Gesch. des R. Münzwesens (p. 172), cites Suetonius, de viris illustribus, 7, 8. The words above were, I know, copied from some edition of Suetonius, but I cannot find them among the fragments in the latest Teubner.

²⁶⁹ Pliny, H. N. 33. 43. Servius rex primus signavit aes...antea rudi usos Romae Timaeus tradit. signatum est nota pecudum unde et pecunia appellatur. In 18. 12. Servius rex ovium boumque effigie primus aes signavit. Varro, R. R. 2. 1. 9. aes antiquissimum quod est conflatum, pecore est notatum? Does this mean moulded (or cast) out of the proceeds of cattle, and therefore marked with the likeness of cattle? See also id. apud Nonium, 189, Verbeem; Varro, de vita P. R. aut bovem aut ovem aut verbecem habet signum. Verbee is the origin of brebie, Littré, s.v.

^{289a} See above, p. 508.

appeared to me extremely suspicious, from their modern style of art. (I have only examined those in the Kirchesian Museum at Rome.) Their provenance, however, and their genuineness are spoken to, with a little hesitation, by Mommsen and the official character of the larger masses appears to be shewn by the word Romanom on some of them²⁹⁰. 2. There is a considerable variety of devices²⁹¹ on these which Mommsen not inaptly compares to a potter's private marks on the tiles of his production. This variety makes not only against Ridgeway's ox and sheep currency but also, I must admit, against any general official marking. There may possibly have been a number of such devices, any one of which, with the rectangular shape, might be taken as proof that the metal had been roughly assayed but of nothing more. The need for a uniform Stadt-wappen, to use Mommsen's term, and clear indication of value (weight), must have become apparent even at so early a time as that of the Twelve Tables.

The derivation of pecunia &c. from pecus is rather in favour of the smaller or grazing stock having once constituted the main medium of exchange, than the ox-unit which Professor Ridgeway prefers. But I cannot deny the extent and interest of the parallels which he quotes (above, p. 508).

Stipendium. This word is probably quoted as a record of the time when *money*, to use its later name, was weighed. I long hoped to find in the difficult word stips some evidence of stamping or marking the raw metal.

But all the attempted explanations of this word are most unsatisfactory. The ancients considered stips to be small

²⁹⁰ See Mommsen, Münzwesen, pp. 171, 173 with note 8 on the former and note 13 on the latter page; also Cohen, Monn. de la République Romaine, p. 349, note 2.

²⁹¹ Besides the ox (Ridgeway's cow) and the sheep, the hog might be considered to have some relation to the value of the animal, even perhaps the hens (Münzwesen, pp. 171, 172). But how as to the Pegasus, the Caduceus or the Eagle and Thunder-bolt?

coin. Ulpian calls stipes modica aera²⁹², which is in accordance with Pliny's stipem spargere and unciaria stipe conlata²⁹³ and the coins thrown into the Lacus Curtii²⁹⁴, though scarcely with the complimentary offerings to an Emperor on New Year's Day²⁹⁵. But their suggested derivations are from fancied connexion of the word with stipare to pile or pack up²⁹⁶ or stipulari²⁹⁷ which is to be explained in quite a different manner as will be seen in the subsequent consideration of sponsio.

In the extraordinary collection of heterogeneous words put together by Corssen² (i. p. 505) under the root stap- (feststellen, to establish) I can see no suggestion of stamping or marking; though there may be a remote connexion with the idea of a stick or rod of copper (see above, n. 283). At the time then when the balance and copper or bronze were connected with the possibly earlier mancipium, in the ceremony which we know as mancipatio, simple exchange or informal purchase was superseded in this case by sale and purchase through a standard medium of exchange which was formally weighed and handed over by the purchaser. In this sale and purchase the object of the required formalities being to put in hand the transfer of the property, a specific statement of the price, the amount of bronze, does not seem necessary. On the other hand it was necessary in the discharge of an obligation to pay such or such an amount, which was discharged and in one case no doubt contracted by the same weighing out of each pound of copper 298. Here the sum was stated although

²⁹² Dig. 50. 16. 27. 1.

²⁹⁵ Id. Caligula, 42. Strenge are the modern étrennes.

 $^{^{296}}$ Varro, \tilde{L} , L. 5. 182. $\sigma \tau o \iota \beta \dot{\eta}$, suggested by him, is sometimes used in the sense of a pack or heap.

²⁹⁷ Festus is responsible for this connexion, who however begins by defining stips as nummus signatus, F. p. 297.

²⁹⁸ Gaius, 3. 173, 174.

the actual weighing of each pound had dwindled down to the formal weighing of one—the first and the last 299.

Mancipatio an imaginaria venditio. This rather puzzling expression of Gaius³⁰⁰ requires some explanation. It appears to be said by him generally of all mancipation, although in most cases this was the conveyance on an actual sale: in others it might be fiduciary-a mere legal artifice for the creation or extinction of a certain status as in the wife's coemptio and the mancipation by parent or coemptionator 301; in others again it might be the creation or discharge of an obligation 302. But none of these can be satisfactorily described as imaginary. That in my opinion simply refers to the handing over the piece of metal or small coin instead of the actual amount of copper, which was really transferred to the vendor in the simple transaction first above suggested. For this is not strictly representative like the una ovis and capra of the grex or the aliqua pars of the columna or navis in vindicatio 303. It is certainly not symbolical, whatever that may mean, nor do I exactly understand Jhering's phrase "residuary," though I am inclined to accept its general meaning 304. The hoc aes was once the actual purchase money as in the nexum, after the pledging the person had ceased, it was the actual loan: though in the latter case there was a further survival in the formal, perhaps truly imaginary, weighing of the first and last pound 305. All this, after the introduction of coined money, became pure formality 306.

Absolute character of mancipation. According to the best ms. of the Digest (F) a statement by Papinian as to

²⁹⁹ Muirhead², p. 59, n. 17; also p. 134. ³⁰⁰ Gaius, 1. 119.

³⁰¹ id. 1. 113, 118: see above, § 3, pp. 86, 91.

³⁰² Gaius, 3. 173, 174. 303 id. 4. 17.

³⁰⁴ That, e.g., the bit of raw copper is a remaining part, or survival, of the payment of the tale of pounds, Jhering⁴, ii. pp. 507, 508.

³⁰⁵ Gaius, l.c. n. 302.

³⁰⁶ See on this subject, Karlowa, RRg. ii. pp. 376, 377.

statutory acts in law, which do not admit of limitation in time or by condition, distinctly includes mancipation and this is confirmed by a passage from a different work of the same jurist quoted in Frag. Vat. 329, even though the condition inserted may be one which is generally considered to be implied in the transaction 307. The last words probably refer to the presumed guarantee in mancipation. In the face, I suppose, of the innumerable subsequent instances of fiduciary mancipation, this is felt to be a difficulty and Mommsen admits into his text an emendation emancipatio due to MSS. usually inferior and the later (9th cent.) Greek translation of Justinian's Digest 808. But this emendation is not 309 universally accepted and I have no doubt that Papinian's dictum is true as to the original effect of mancipation. The introduction of fiduciary mancipation, and of express guarantee are probably due to the nuncupatio, which evidently began to be employed before the Twelve Tables, but was recognised and sanctioned by that Code, with which it is best considered. In itself, the form of mancipation suffices for transfer of ownership whatever payment of or credit for the actual price may have preceded or followed it 310.

Guarantee against eviction. This is often treated as a liability incumbent upon the mancipator, resulting *ipso facto* from the mancipation. But it is more probable that the usual obligation to refund to the *accipiens* double the price he has paid, in case of eviction, is also the result of a nuncupatio³¹¹ and that the only original security of the

³⁰⁷ Dig. 50. 17. 77. Fr. Vat. 329.

³⁰⁸ The version of the Basilica is $\ell\pi l \ \tau \hat{\eta} s \ ab\tau \epsilon \xi o \nu \sigma i b \tau \eta \tau \sigma s$, a rare word used by Josephus in the sense of independent power. On Mommsen's general use of the Basilica as an authority see the Preface to his larger ed. of the Digest, 1870, p. lxxvi.

 $^{^{200}}$ e.g. not by Girard 5 , pp. 289, 293, and only with demur by Karlowa, ii. p. 379.

³¹⁰ See Karlowa, ii. p. 380.

purchaser lay in the "backing" which he would receive, in that case, from the witnesses³¹². The reduction of any liability, which may have begun, later, to be presumed or implied in mancipation, to a trifle, by the sale nummo (i.e. sestertio) uno is obviously posterior to the introduction of a silver currency, 269 B.C. But all such later legal devices and expedients as appear for instance in the emptio servorum, of which we have a record in Bruns⁷, p. 332, are quite out of place here³¹³. The only thing which we can safely treat as connected with the original mancipation or recognised mancipium, is immediate transfer of ownership with probable support in its enjoyment by the "witnesses."

III. THE CLAUDIAN TRIBE AND EARLY REPUBLICAN HISTORY

IMMIGRATION of the Claudii, p. 556. The 21 tribes of Livy, 2. 16, 558.
The first dictatorship and the battle of the lake, 559. The Clustumina, 561. The Claudii, 563. Mommsen's account, 564.

On one tribe I have to speak particularly with reference to the immigration of the great Claudian *gens*.

Sprung from the Sabine town Regillus or Regilli for which we have to look in vain among the historic remains in the vicinity of Rome³¹⁴, this clan, with a huge body of clients, comes over to Rome, by Suetonius' account, in the reign of Romulus, at the instance of Romulus' colleague Tatius; or, according to the more established tradition, in the 6th year after the expulsion of the kings³¹⁵, i.e. the end of the war

³¹² See above, p. 546, n. 262.

³¹³ See, at great length, Karlowa, RRg. ii. pp. 376—379.

³¹⁴ Even the lake, according to Burn (Rome, &c. p. 22) has been absorbed.
315 Suetonius, Tiberius, 1. Patricia gens Claudia (erat enim et alia plebeia nec minor potestate nec dignitate) orta ex Regillo oppido Sabinorum. Inde Romam recens conditam cum magna clientum manu commigraverit auctore
Tito Tatio consorte Romuli: vel, quod magis constat, Atta Claudio gentis

with Porsena. In his account Dionysius makes the migration take place on the occasion of a war with the Sabines, after Porsena's retirement, a war of which the Claudian clan, or their chief Titus Claudius, had been the solitary opponent. This defection of a large force, amounting with friends and clients to 5000 armed men, contributed greatly to the success of the Romans in the war. In return for this, Dionysius proceeds, the Senate and the People enrolled Claudius among the Patricians, allowed him to choose as much space as he liked within the city for residence, and added of the public land between Fidenae and Picetia a territory for distribution among his clients, from whom was formed, in later times, a tribe, called the Claudia, which continued to bear the same name down to Dionysius' own time³¹⁶.

Livy, after recounting the same story about the original Attus Clausus (afterwards Appius Claudius) ends in the ambiguous words quoted below³¹⁷. Mommsen takes this passage to be an anticipation by Livy of the phraseology of his own time. Whether the *tribus Claudia* was or was not originally formed on this occasion, what he says is that in conprincipe, post reges exactos sexto fere anno a patribus in patricios co-operto. Agrum insuper trans Anienem clientibus locumque sibi ad sepulturam sub capitolio publice accepit. See the periocha of Livy, Bk 2, and text 2. 15, 16.

316 Dionysius, 5. 40. Δνήρ τις έκ τοῦ Σαβίνων ἔθνους, πόλιν οἰκῶν Ὑήγιλλον, εὐγενὴς καὶ χρήμασι δυνατὸς Τῖτος Κλαύδιος, αὐτομολεῖ πρὸς αὐτοὺς συγγένειάν τε μεγάλην ἐπαγόμενος καὶ φίλους καὶ πελάτας συχνοὺς αὐτοῖς μεταναστάντας ἐφεστίοις, οὐκ ἐλάττους πεντακισχιλίων τοὺς ὅπλα φέρειν δυναμένους....καὶ τοῦ κατορθωθῆναι τόνδε τὸν πόλεμον ἀπάντων ἔδοξεν αἰτιώτατος γενέσθαι: ἀνθ' ὧν ἡ βουλὴ καὶ ὁ δῆμος εἴς τε τοὺς πατρικίους αὐτοὺ ἐνέγραψε καὶ τῆς πόλεως μοῦραν εἴασεν ὅσην ἐβούλετο λαβεῖν εἰς κατασκευὴν οἰκιῶν χώραν τ' αὐτῷ προσέθηκεν ἐκ τῆς δημοσίας τὴν μεταξὺ Φιδήνης καὶ Πικετίας, ὡς ἔχοι διανεῖμαι κλήρους ἄπασι τοῖς περὶ αὐτόν, ἀφ' ὧν καὶ φυλή τις ἐγένετο σὺν χρόνφ καὶ μέχρις ἐμοῦ διέμεινε τὸ αὐτὸ φυλάττουσα δνομα. Picetia (Μες.³ iii. p. 26, n. 1) is unknown: Fidenae is about halfway between Rome and Crustumerium (Burn, Rome and Campagna, pp. 391 sqq.).

³¹⁷ Livy, 2. 16. Vetus Claudia tribus, additis postea novis tribulibus, qui ex eo venirent agro, adpellata.

sequence of this settlement, those of the Claudian tribe (which in after times included many other members) who now came from this district were called specially the old Claudia³¹⁸.

The 21 tribes of Livy, 2. 16. The accounts of the early years of the Republic are, it is now known, extremely confused, and any attempt to blend them into a consistent whole may be welcomed.

Now Mommsen appears to me, though he nowhere very distinctly says so, to trace a connexion between two different events—the formation of the Claudian and the Clustuminan tribes. Both are, as it seems to me, concerned directly or indirectly, with the difficult question of Livy's 21 tribes; but they are not, so far as I can see, connected with each other. In the year of the death of the common enemy Tarquinius Superbus (495 B.C.) the particular oppression, says Livy, of the Plebeians by the Patricians began, which culminated in the secession of the following year. An apparently quite irrelevant piece of news follows—the supplementation of Signia, founded by King Tarquin, with an additional number of colonists. Then, very abruptly, the making up³¹⁹ of the tribes, at Rome, to one and twenty, and the dedication of the temple to Mercury.

Now, as there is no notice taken of any variant

³¹⁸ Tribus, pp. 6, 7. Madvig (Emm. Liv. p. 56) is much more explicit, although he unnecessarily suggests the emendation vetus *Appia* tribus. As to the general sense he writes, Ex his Sabinis cum Appio Claudio transfugis, quibus ager trans Anionem datus est, solis initio Claudia tribus constitute est: posteaquam in eam tribum novi tribules, extra eum agrum, additi sunt, usu receptum est ut illi agri ex agro Romano et ad comitia venirent. Veteris Appiae (better Claudinae) appellatione distinguerentur a ceteris tribulibus. As to Livy's venirent, which a little puzzled me, he adds, Livius, suo more, de re saepius facta conjunctivo modo usus est.

²¹⁹ Livy, 2. 21. Romae tribus una et viginti factae. The author of the periocha (Teuffel (Warr), i. p. 54) writes Appius Claudius ex Sabinis Romam transfugit. Ob hoc Claudia tribus adjecta est. Numerus tribum ampliatus est ut essent viginti una. C. T. Zumpt, accordingly, in his Annales, says directly, anno 495 n.o. Romae tribus 21 factae adjecta Claudia.

from the accepted Ms. reading of Livy by Madvig, we may assume him to consider that for which there is universal manuscript authority³²⁰ intrinsically impossible; and it is, in fact, directly contradicted by the story of Coriolanus, in which we are told that he might have been acquitted "for equality" of votes, had he gained those of two more tribes than he did³²¹ which seems to suggest a total of 22; but the words "for equality" however are probably a "grammarian's" mistake suggested by the "Calculus Minervae^{321a}."

But the main result of a reading, passed over as not worthy of remark by Madvig, is evidence of some general belief in an original 30 entertained by early authorities.

The Appius Claudius, consul in 495 B.C., is put down, in the Fasti, as Sabinus Regillensis, and although the early "additions" are probably only evidence of the fancies of Augustan compilers, one is disposed, at first sight, to connect him with the "glorious fight" by the lake of early Roman legend, familiar to all readers of Macaulay; the Consul, or Dictator, of the previous year being also styled Regillensis, obviously from his alleged command in that engagement. But any such connexion is as purely imaginary as, I believe, are the initiation of the Roman Dictatorship with Postumius, and the battle itself, at least on this occasion, 501 B.C.

The first Dictatorship and time of the battle of the lake. The Sabine war in which the Claudian refugees help the Romans to victory (Dionysius, 5. 40), is separated from the Latin one by more than half a book of Dionysius, including a strange story of the institution of the oratio (Dionysius, 5. 47. 3), until the war is closed by the usual humble suit for peace on the part of the enemy, and the triumph of Sp. Cassius (id. 48. 3). Then follows an account

³⁸⁰ Mommsen (Msr.³ iii. p. 167, n. 3): haben die Handschriften alle Romae tribus una et *triginta* factae.

³²¹ Dionysius, 7. 64; 8. 5

³²¹a Dio, 51, 19: Msr.3 ii. p. 958.

of the defection 322 of the Latins, under the machinations of Mamilius, who at the same time stirs up disaffection in Rome itself (Dionysius, 5. 50, 53); the suppression of an impending revolt, by supernaturally prompted information, for the longwindedness of which account Dionysius himself apologises (id. 56); the siege and relief of Signia (id. 57); and the final outbreak of the great Latin war, a detailed list being given of the confederate cities (id. 61); finally, after the usual amount of speech-making, the appointment of Lartius as the nominal first Dictator (id. 73, 75). The real battle of the lake Regillus occurs two years later, the particulars being much the same as those given by Livy, who placed it five years earlier, 501 B.C.³²³, while admitting the difficulty of his first Dictator-a young Valerius-and the probabilities in favour of the appointment of Lartius, and the placing of the famous battle, by some, in the year 496 B.C.324

On whichever of the two dates suggested for it the battle of the lake Regillus, if it ever occurred, was fought,

³²² Dionysius, 5. 53, 54, and passim both in him and Livy. If it were not waste of time to moralise, a parallel might well be drawn between the overweening conviction of the Romans, as to the obvious duty of all their neighbours to obey their supremacy, and that of a certain modern nation. Absit omen!

³²³ Livy, 2. 19. The vision, however, of the Dioscuri (only vouchsafed to the dictator Postumius and his immediate surrounding), with their bringing the news to Rome, we owe to Dionysius alone (6. 13), who by-the-bye gives Sextus a more honourable end than Macaulay does (id. 12. 5). I do not think the "stately dome" promised by Sergius the High Pontiff, has any connexion with the temple of Mercury mentioned by Livy, 2. 21, 27. See Burn, Rome and Campagna, p. 298, n. 4. For the temple actually vowed by Postumius (Livy, 2. 20, 42) see Burn, pp. 100, 101.

s24 i.e. in the consulship of Postumius and Verginius. The latter is the collega dubiae fidei hinted at in Livy, 2. 18, nec quibus consulibus parum creditum sit, quia ex factione Tarquinia essent (id quoque enim traditur). For this use of quia with the subjunctive, cp. c. 21, quia collega dubiae fidei fuerit, and see § 14, p. 440, and Roby there cited. On secundum quos in the same chap. of Livy, Madvig's caution, Emend. Liv. p. 58, should be noted.

the formation of the Claudian gens preceded it and had nothing to do with it.

The Clustumina³²⁵. The other tribe above (p. 558) referred to is distinguished from those which precede it, all of which bear obviously gentile names, by being clearly connected with a place, which was, as late as 171 B.C. recognised as part of the old Sabine territory³²⁶. This fact may have led to the confusion which I have, perhaps unjustly, attributed to Mommsen (above, p. 558). The same place appears, according to Varro³²⁷ to have given its name to the first secession of the Plebs, which, by the generally received tradition, took place to an eminence beyond the Tiber, not so far as Crustumerium, but in that direction³²³.

Now it is true that, in the account of this Crustumine secession, as Varro calls it, there is no mention of any new distribution of land, such as generally accompanies the formation of a new Tribe, nor of any such formation at all. The institution of *Tribunus* must be conceived, I suppose, as overshadowing all such comparatively unimportant matters³²⁹. The connexion, therefore, of the Clustumine or Crustumerian Tribe with the secession is a mere surmise. And yet I cannot resist the temptation to follow the slight hint furnished by Varro, and conclude that this is the last of the old, or rather the beginning of the new series of Tribes, that the date of its formation is the year of the secession,

³²⁵ For the spelling see Msr. 3 iii. p. 171, n. 1.

³²⁶ See the speech of Ligustinus (171 B.c.), Livy, 42. 34. Sp. Ligustinus tribus Crustuminae ex Sabinis sum oriundus, Quirites.

^{*27} Varro, L. L. 5. 81. Tribuni plebei facti, qui plebem defenderent, in secessione Crustumeriana.

³²⁸ Livy, 2. 32: Dionysius, 6. 45. δρος τι πλησίον 'Ανίητος: Dio, fr. 16. 9 (Melber, p. 43), κολωνόν τινα κατέλαβον. It is apparently 8 miles short of Crustumerium. See Livy, 5. 37 ad finem.

³²⁹ Livy, 2. 33: Dionysius, 6. 87, 88. The direct object of the secession is represented by both as the immediate protection of the Plebeian by inviolable plebeian magistrates.

and its constituents are the revolting Plebeians. The graphic story of the secession in Livy is familiar to any reader of Roman history. In the longwinded but obviously more truthful account of Dionysius, the brief dictatorship of one of Livy's moderate liberals—the Valerii—with the usual military success (Livy, 2. 30) is as we have seen (p. 560) replaced by a new first Roman dictatorship, in the person of Titus Lartius (see Livy, 2. 18), which Dionysius makes the occasion for a didactical disquisition on the possibilities, for good and evil, of the rule of one, exemplified, amongst other things, by the recent case of Sulla³³⁰.

But there are two interesting points in this rather dreary reading of which I have given an abstract above. First, the genuine first dictatorship of Titus Lartius, with Sp. Cassius for his magister equitum³³¹, is clearly a futile attempt to stave off the impending revolt at Rome by conciliation, not a pageant to overawe the recalcitrant Plebeians, and the measure which has the best chance of attaining this object is described as a revival of the best of the institutions of the Commons' King, by the reestablishment of a correct register, which apparently had been neglected or omitted³³².

Now, there is no popular reform in a mere register: this is therefore some confirmation of the vesting of land in plebeian owners, which is suggested above (p. 506) as one of the effects of Servius' register.

Second, we find here one of the few truthful admissions, in one of the ever-recurring Valerian speeches, of the straits to which Rome had actually been reduced in the war with

³³⁰ Dionysius, 5. 75-77.

³⁵¹ Whose subsequent career is well known, Livy, 2. 41: Dionysius, 8. 76—82.

³³² Dionysius, 5. 75. το κράτιστον τῶν ὑπο Σερουτου Τυλλίου τοῦ δημοτικωτάτου βασιλέως...πρῶτον ἐπέταξε ποιῆσαι Ῥωμαίοις ἄπασι τιμήσεις κατὰ φυλάς τῶν βίων ἐνεγκεῖν προσγράφοντας γυναικῶν τε καὶ παίδων ὀνόματα καὶ ἡλικίας ἐαυτῶν τε καὶ τέκνων.

Porsena; and of the seven pagi which she had had to abandon, when her territory was occupied by the Tuscans³³³. For this is, as Niebuhr³³⁴ saw, the true explanation of Livy's 20 Tribes, which were "made up" to 21, by the addition, it is submitted, of the Clustumina: the Claudia was already one of the old tribes, and the Appius, for the time being, whether the original Atta Clausus or not, follows Valerius in the Senatorial debate with one of the uncompromising speeches systematically attributed to this family³³⁵. On this subject I shall have a few words to say presently. At present I may remark that the view of Niebuhr, as to the 20 Tribes, is supported by a note of Müller on Festus³³⁶.

The accompaniment of the Crustumerian secession with a distribution of land is, as has been said (p. 561) a mere surmise; but it may possibly be indicated in the irrelevant remark of Livy about Signia, although no doubt this is a post of some importance³³⁷. Mommsen, I may add, prefers to connect this first republican settlement of the number of the Tribes with the law of Publilius Volero which is generally placed in the year 471 B.C. under the consulship of the second Appius Claudius Regillensis, the decimator of his fugitive army (Livy, 2. 57).

The Claudii. The remarkable family, which henceforth plays so considerable a part in the history of Rome, deserves some note here. The Claudian gens, we are told by Suetonius (see note 315), was a double one, the plebeian branch being not less in power and dignity than the patrician.

³³³ Dionysius, 5. 65, cf. 2. 55, and above, § 9, n. 74.

³³⁴ Ed. Schmitz (1870), p. 131, see above, pp. 513 sqq. Mommsen also (Tribus, pp. 4, 5), though not very clearly, appears to accept the idea.

³³⁵ Dionysius, 5. 66.

³³⁶ Festus, F. p. 233, Popillia. As neither this name of a tribe, nor Pinaria, exists in historical times, Müller conjectures them to have been among the ten of whose territory the Romans were deprived in the war with Porsena.

²³⁷ Remains described by Burn, Rome, p. xxiii. See also Dionysius, 5. 58.

This then is an instance of a plebeian gens being formed out of clientes (see above, § 5, p. 157 and § 7, p. 268), and becoming subsequently independent, for it is possible, from the history of a case mentioned by Cicero³³⁸ that there was no love lost between the branches. The Marcelli were, as we see from this lawsuit, of the plebeian, the Nerones, from a fact stated by Livy³³⁹, of the patrician family.

In his able article on the patrician Claudii340 Mommsen, dwelling more particularly on its two leading representatives in the histories of Livy and Dionysius, the Decemvir and Appius Claudius Caecus, both men of masterful and determined character, but also generally on the vetus and insita superbia attributed to the whole family by these historians, enumerates the many contradictions and improbabilities in their accounts, and shews that the true character to be recognised in these statesmen is that of patrician Radical. That this character is not inconsistent with the extreme of aristocratic hauteur we have modern instances enough to prove. To me the prominent feature in the family is rather that of great ability and versatility 341, with an admixture of far-sighted political expediency which has earned for many a noted politician the epithets of turn-coat and renegade. Politics, in fact, rather than the usual Roman field of military action, are the sphere of the Claudian genius, of which Macaulay makes the most in his fine lay of Virginia³⁴². In the one important action where Livy allows

³³⁸ See Cicero, de oratore, 1. 39. 176, on the suit between the Marcelli and the Claudii patricii. Above, p. 118.
³³⁹ Livy, 27. 34.

³⁴⁰ Forschungen, i. pp. 287-318.

³⁶¹ I have always been inclined to connect this feature in the portrait of Caecus with the extraordinary epithet conferred on him, in repute, by Pomponius, Dig. 1. 2. 2. 36, of Centemmanus, except for the existence of the somewhat similar cognomen of the same family, Centho, which must be otherwise explained.

^{342 &}quot;Though the great houses love us not, &c." Her pathetic story (the truth of which I fear I am heathen enough to doubt), is apparently

a Claudius to rise to the usual level of a Roman general in war³⁴³ Mommsen quaintly accounts for the vow of Appius to Bellona, by saying that man sometimes pays his most devoted homage to the Deity that contemns him 344. This same Appius is however, as we know, lauded by Cicero for an instance of the wholesome domestic despotism of ancient times, exercised by him, in his extreme old age³⁴⁵, in which also he defeats the proposals of Cineas the eloquent ambassador of Pyrrhus346 by his oratory. But it is needless to accumulate instances of the commanding ability of this gifted family. The peculiar animus against them evinced by the historians is attributed by Mommsen to some one source, probably Licinius Macer³⁴⁷, who is repeatedly quoted by both Livy and Dionvsius, though the former at least is quite aware of this author's tendency to exalt his own family at the expense of others348. Other sources have been suggested349; but this digression has already extended to too great length.

accepted by Mommsen, and accounted for by the old Greek notion of the Demagogue turned tyrant. Mommsen, Forsch. i. pp. 299, 300. Cf. Dionysius, 6. 60. πᾶς τύρανγος ἐκ δημοκόλακος φύεται,

343 Livy, 10. 19.

344 Mommsen, Forsch. i. p. 303.

345 Cicero, de Senectute, 11. 37.

346 Periocha, Livy, 13: Plutarch, Pyrrhus, 18, 19.

347 Mommsen, l.c. p. 315. See Teuffel (Warr), i. § 156, pp. 231, 232.

348 Livy, 7. 9.

³⁴⁹ I was formerly inclined to credit with the same tendency Claudius Quadrigarius (Teuffel, i. § 155), who may have been a member of the plebeian branch. But of this I have no good evidence. For an interesting note on this man, and his usual surname "The Jockey," see Mommsen, Forsch. ii. p. 426.

§ 17. REGIAE LEGES. GENERAL CHARACTER

ALLEGED Roman legislation generally, in technical sense, p. 566. Early constitutional law, the curiate system, 567. Particular changes in, attributed to Servius, 568. General legislation attributed to Romulus and Numa, 570. Regiae leges, ib. Tullus, 571. Ancus, 572. Servius, 573. Linguistic peculiarities of Regiae leges, 574. Their religious aspect and doctrine of self-help, 575. Not merely a sacral department of law, ib. Public wrongs first, as sins, 576. Mommsen's view, ib. Esoteric rubric, Arval and Salian hymns, ib. Same character in alleged legislation of Numa, etc., 577. Lex of spolia opima, ib. Other attributions to Numa, 578. Porca praecidanea, 579. Subsequent possible utilisation, ib. Year of mourning, 580.

Having spoken of the probable elements of the Roman State as it was originally formed, or formed itself, of the development of Roman Sovereignty, and of important changes which must be connected with the name of Servius, I come last to consider the alleged legislation of the Royal period generally, and the individual enactments attributed by Roman writers to the different Kings. I am not here referring to a legislation by ordinance or proclamation (which I myself think historically not impossible), connected with what I believe to be the original and derivational meaning of the word lex; but to legislation in the Roman technical sense indicated by Capito's definition. A lex, according to this jurist, is a general command of the populus or plebs, on question put to them by a magistrate. It is not necessary

now to enter into the subject of generality, which here, I believe, means general application to the cases of all citizens². The point at present to be considered is that of question formally put to, and accepted by, a popular assembly. On the probability, or otherwise, of such a proceeding, under the kings, I have already spoken (§ 10, p. 382; § 11, p. 389; § 15, p. 475) and wish only here to add a few words, partly on general grounds, partly with reference to the special details traditionally predicated of it. To the actual fragments called Regiae leges I shall come later.

Early constitutional law. For convenience it is necessary to use the modern phrase above given. But the term constitutional law must be taken in a much wider sense than the modern one for early Rome, where what we should call by that name is inextricably connected with old family law, and, in a very prominent degree, with religion. Probably all the matter to which I refer might be brought under the head of Personal Law, but that expression again would have to be taken in a wide sense, and the distinction of it into Public and Private would be impossible.

I have spoken sufficiently above (§ 4) upon the improbability of legislation, in any sense of the word, being originated upon the ancient institutions attributed to Romulus or other of the early kings, but of the possibility that a utilisation, and to some extent a reorganisation, of preexisting elements, under a gradually formed Sovereign power, may quite conceivably have taken place. In this I myself am inclined to believe, regarding it as the substitution of a social or religious local grouping for the small individual settlements of an invading Host, the latter resembling those of the Saxon conquerors of our own land. And, while I consider the original units to be self-formed, not created ab extra, on the other hand I think the arrangement or redistribution of them

² Practical Jurisprudence, pp. 111, 112.

does bear the impress of some individual mind, though it does not necessarily postulate anything like an act of deliberate legislation. The Curiate system, with its artificial triads, is the result of a combination of two slightly different national constituents, united by the intervention of a third—a result springing rather from circumstances than from any very definite design. In this respect it differs from the later system, which I come next to discuss.

The constitutional reforms attributed to Servius Tullius are generally represented as matter of express legislation: but it may be questioned whether they cannot in great part be traced to regulations made by an administrative authority (§ 16, p. 536). Curiously enough there is little or nothing quoted verbatim, as coming from Servius in the shape of law, except an obvious reference to the crime by which he is said to have perished (ib. p. 538). The part of the reputed Servian system really attributable to him was, I take it, merely a register of landed property and its appurtenances with a view to a muster or array for military purposes, and a partial levy of the more considerable landed proprietors as a militia. Its political aspects as an assembly, and its developement into a system of plural classes are probably later than the regal period. A solemn form-mancipationwas undoubtedly required for any transfer of the registered property, and out of this there grew, as we shall see when we come to the Twelve Tables, methods of Trust, Contract and Testament which are an important part of Private Property Law. But whether these were any part of the original design may be questioned.

Outside the general constituent law of Servius, a number of miscellaneous provisions attributed to him have been mentioned above (§ 16, p. 537) all bearing a suspicious resemblance to later reforms, and most of them capable of being resolved into simple matter of administration.

The alleged making of laws by Tullius, "which even the Kings were to obey3," stands rather by itself, and may represent a public proclamation allowing a right of appeal from certain capital sentences4. And generally, although we cannot attribute to Servius what is here considered to be the work of the founder of the Tarquinian dynasty, i.e. the initiation of a compromise between a privileged and an unprivileged race, we can certainly perceive signs of a great advance in the same direction, by a mediator, of somewhat questionable title, who does not secure his own parvenu headship without some sacrifice of prerogative. Possibly the commentaries of Servius, of which Livy speaks⁵, may not have been entirely fabulous. A draft of further reforms, intended to be carried out by the administrative, is just conceivable, all of which would naturally come to an end in the undoubted tyranny with which the royal period closes.

As to the "some fifty" statutes passed by Servius, before the curiae, on contracts and wrongs⁶, the amount and part of the subject-matter is suspicious, as is (see § 10, p. 382) the act of formal legislation generally. But it is by no means impossible that a modified edition of certain existing rules, bearing at any rate on delict, was published by the reforming King, on tablets or columns, which were destroyed by his successor.

Of obligation ex contractu in this early period we know nothing definite. An old form of promise sanctioned by moral or religious penalties only (sponsio) may have existed; as also engagements on oath: but we cannot assert any

³ Tacitus, Ann. 3. 26.

⁴ Is Tullus' allowance or suggestion of appeal in the case of Horatius, Livy, 1. 26. 8, due to any confusion with this ordinance of Servius Tullius? See E. R. L. p. 66.

⁵ Livy, 1. 60 and § 16, p. 537.

Dionysius, 4. 13. ξπειτα τους νόμους τούς τε συναλλακτικούς και τους περι τῶν ἀδικημάτων ἐπεκύρωσε ταις φράτραις ἢσαν δὲ πεντήκοντά που μάλιστα τὸν ἀριθμόν κ.τ.λ.
 7 id. 4. 43.

secular magisterial recognition of such obligations until the late date of 326 B.C. The occasion referred to is the sequel to the abolition of personal nexus, a remarkable species of bond, which appears to have been developed in practice at some time posterior to the Servian adoption of mancipium, and prior to the legislation of the Twelve Tables, under which its consideration properly falls.

The subject of early legislation, dignified with such names as Romulus and Numa, has been repeatedly recognised as an improbability amounting to impossibility. We can only see here, particularly in the institutions of Family Law, the customs of two or three (originally perhaps only two) tribal unions coalescing into a State, under Headships first religious, ultimately secular. The earliest rules of practice which it is found necessary to formulate are those which deal with wrongs, or crimes, as sins. This is apparent when we come to deal with the actual fragments of the Regiae leges. The alleged details of Royal legislation generally have been already briefly noticed in the sketch of the developement of Sovereignty, §§ 13, 14, 15.

Regiae leges. I come now to actual quotations of leges said to have been passed by this or that King. I am of course speaking of fragments which have the aspect of genuine antiques not of obvious fabrications like those in Cicero, de legibus. With regard to these fragments the questions arise (1) what is their real age; (2) what is the mode or form of legislation, if of legislation at all, to which they belong.

As to age, the reputed royal authors of several fragments no doubt prove that the Roman writers of the later Republic believed them to date from a time anterior to the earliest form of that constitution. With regard, in particular, to the institutions represented as coming from Romulus, while I must continue to take the personality of this eponymous

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hero as a fiction, I consider, as has been said already, that their attribution to him is *primâ facie* strong evidence of a primeval antiquity (§ 1, p. 9).

The subject-matter of the Regiae leges in general affords to my mind a strong presumptive evidence for their antiquity. With the exception of the rule on perduellio, which there is fairly good reason to put late in the regal period, all our fragments have a clearly religious character and that of a somewhat barbarous and archaic religion. Nor is this character entirely wanting in the excepted case itself. This particular argument, I admit, loses its force with those who consider that we have only the remains of one part of the regal system of law. But this is a view to which I hope to shew that exception may be justly taken.

As to any *relative* priority, because one rule has been fathered on Romulus or Tatius and another on Tullus, and the like, it is, of course, unsafe to place reliance upon an assignment which may be accounted for on intrinsic grounds.

The particular attribution of so much to Numa, who is, if possible, more legendary and typical than Romulus himself, is a combined result of subject-matter and literary source. The comparatively uniform character of these fragments, and the accompanying legends, I take as general evidence of that stage in the developement of sovereignty which we may call the Priest-head as distinguished from the mere chieftain typified by Romulus, who is probably responsible for the traces of an older military order which precedes even the Curiate system (see §§ 12, 14). As to literary source, see Sources, p. 31.

On the somewhat conventional personality attributed to the third King I have little to say except that the legendary treatment of the "law" of perduellio as prior to Tullus (who quotes and interprets it), in the story of Horatius, seems to me to separate the whole subject much too far from the Valerian constitution which is placed by our authorities at the beginning of the republic. There may also possibly be some confusion between Tullus and Tullius. But I am prepared on the whole to revoke the opinion previously expressed in my Early Roman Law (p. 64) and, in agreement with Cicero⁸, to place the procedure on *perduellio* altogether rather in the reign of the tyrannical last King. I shall however speak further of this below (§ 19).

Ancus would scarcely need mention, but for the story of this monarch's *publishing* part of the religious regulations due to his predecessor Numa. On the genealogy of the *Ius Papirianum* and the stories of original publication connected with it, I have spoken elsewhere.

In the case of the three successors of Romulus generally I do not absolutely deny their historical possibility in spite of the preposterous length of such a succession of reigns and the occasional introduction of a miraculous element. But, considering the obviously fictitious appropriation of these heroes, as ancestors, by successful plebeian families in historical times, I am now less disposed to regard them as possible early chieftains (E. R. L. pp. 54—58) than as inventions of romance or heraldry, perhaps indicating traditional alternations of predominance between two imperfectly associated tribal groups.

An attempt at the more complete welding together of these two groups, is clearly connected, to my mind, with the attainment of a genuine Sovereignty by the great Etruscan family with which the regal period closes. The regularity of the Curiate system necessarily presupposes the working of some individual mind, and there is none more likely than the head of the third contingent, called in evidently as peace-maker. I come to this conclusion in spite of the

⁸ Pro Rabirio perd. reo, 4. 13. See Donaldson, Varronianus³, c. vi. § 5.

⁹ Sources, § 1. Proc. Soc. Ant. xviii. pp. 406 sqq.

evident fables connected with the names of Lucumo and Tanaquil.

As to the author of the Servian reform there is such a persistent and peculiar character in the traditions and practice connected with his name, that it is difficult to avoid recognising in him a real personality in spite of the stories of superhuman descent, which probably arose in part from his traditional name.

I take Servius, of course, to be a bona fide member, though perhaps irregular in point of origin, of the Tarquinian family. The splendour and ultimate tyranny of that race, which have left their mark on Rome to this day, have parallels enough in early national histories, and the narrative of the outrage, which brings about their fall, barring some contradictions in the personality of Brutus, has much less improbability about it than the later and more pathetic tale of Appius and Virginia.

In mode of expression, apart from the archaism subsequently referred to, the fragments of the Regiae leges do not differ much from those of the Twelve Tables. They are "general commands," to use Austin's phrase, rules of conduct laid down in a directly imperative manner. In spite of this, it may be doubted whether they were not, in their remotest origin, rather memoranda for the priest or judge than laws published for the guidance of the people. The semi-metrical form of several fragmentary quotations points I think to a primeval state of things in which the tribal feeling interpreted or developed by a chief priest had to be orally recorded or handed down within the hierarchy. And it was natural that the old fashion of a metrical run should be retained even when its original necessity had passed away, as in the formula of perduellio, which may be comparatively late, or the Salian hymn which may be even later 10.

10 Is the whole story of the "shield that fell from Heaven" a pious fraud, intended to overcome the reluctance to change the old national armature

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Linguistic peculiarities. Of much greater weight than any alleged legislator is the intrinsic evidence, as to age, to be gathered from the fragments themselves, their linguistic peculiarities, their subject-matter and their undoubted literary source. With regard to grammatical inflexion, we find in the laws attributed to the Kings, two instances of early Indo-Germanic terminations—final d in 3rd sing, imperative, and final s in nom, sing, of a declension -all but unique in Latin, and absent from our remnants of the Twelve Tables¹¹. I do not wish to press this argument for more than it is worth. We cannot say that these terminations were obsolete when the Decemviral laws were originally compiled. These latter, however, being in practical use, might naturally be altered to a more modern linguistic form than that of their date of publication or enactment, at least after the first "Tables" were destroyed. The "laws of the Kings," whether preserved by copy or handed down by oral tradition. remained unaltered, which fact is, in itself, an argument for their venerable and antique character. So in our own time and country we find, in old phrases and formularies, particularly of a religious character, an archaic orthography sometimes retained with an instructive reverence12. So in for the more effective equipment of the phalanx, borrowed from the Greek? Dionysius, 2. 70, somewhat confuses the shapes of the πέλτη θρακία and the θυρεός. The Ancilia represented on the well-known Florentine gem (Daremberg et Saglio, iv. p. 1020) certainly resemble the latter rather than the round target, see § 16, p. 493.

11 The final d of the 3rd sing. imperative (Festus, F. p. 230, Plorare) is an antiquity rare in Latin, though instances are found in the Oscan estud, factud, licitud of the Bantine tablet, and in the inscription on the cippus in the Forum (C. I. L. i. p. 366). Corssen²(i. p. 206) quotes nur ein Beispiel, facitud, from C. I. L. i. p. 813. Cf. the Vedic tarpatat (τερπέτω), Bopp, Comp. Gram. (tr. 1845), § 470. The other quotation in the same passage of Festus, it will be observed, wants the d, as do the imperatives of the XII. The final s of the nominative of the first declension, occurring in paricidas (Festus, P. p. 221, Parrici), is not found in the XII, and only that I am aware of in one other word, hosticapas, also from Festus, P. p. 102. See Corssen, i. p. 285.

12 E.g. an horse, an hundred, a peny &c. in our Bibles and Prayer-books.

the Papirian inscription^{12a} (as I venture to call it) we have a possible instance of the same final d in the imperative estod, and probably a very ancient predecessor of sacer (sacros) (see Corssen², ii. p. 592 and rubrus, i. p. 49). That esed may = erit (ib.), in the face of Corssen, ii. pp. 728, 729, I scarcely dare to suggest.

Religious aspect and doctrine of self-help. But the most prominent features in the oldest legal institutions of Rome are: on the one hand their general religious aspect (including special recognition of the monandrous and monogynous family); on the other their extensive and express admission of the principle of self-help, as it is called, for the assertion of right and the redress of wrong (the latter clearly including the exaction of revenge).

Not merely a sacral department. The religious aspect referred to is, as it appears to me, insufficiently acknowledged by certain modern writers on Roman law. Jhering¹³ supposes the line between divine and human ordinance, θεσμός and νόμος, to have been only drawn, for Greece, within historical times; while, at Rome, he holds fas and jus to have been distinctly separated, from a period absolutely primeval. In accordance with the same view, I think it is at least suggested, by good writers, not merely that the Regiae leges represent only a jus sacrum, but that there must have been, beside them, an independent body of secular ordinances or rules of practice14. Of such ordinances, however, there is little or no trace. Rules of practice may have been developed and preserved, in the regal period, on secular matters: but I cannot find any recorded or published ordinances, until just before the close of that period, on any but sacral or semi-sacral matters (see below, on perduellio).

14 See Muirhead, pp. 17, 18, cf. 21.

^{12a} Bruns⁷, i. p. 14. See, however, Skutsch, cited ib. p. 15.

¹³ Jhering, i. p. 266: on fas and jus see my Jurisprudence, i. p. 298.

Public wrongs first, as sins. To consider more closely the scope of the earlier Regiae leges: they deal mainly, if not exclusively, with wrongs or offences. As I understand Mommsen, he holds that there most probably was, in regal times, a distinction between offences against the community and against the gods of the community, but that these were confused because the prosecution of them lay in the same hands—those of the King¹⁵.

I venture, on the other hand, to suggest that this is probably only true of the time of Superbus, or the Tarquins generally, and that in the oldest formulated rules of Roman law we have the first conception of a public offence in the shape of sin: that we may trace a subsequent utilisation or development of religious obligation or penalty to cases not connected, at least directly, with religion: that, in fact, the earliest formulated Roman law, which is that of public wrongs, belongs to both the departments of fas and of jus.

Going more closely into the matter, Mommsen speaks, in his History¹⁶, of the Pontiffs fixing and promulgating the general exoteric precepts of ritual which were known under the name of the Royal laws.

I have spoken, elsewhere¹⁷, of the exoteric character of some of these fragments, and the necessity for their publication: but I certainly think, with due submission, that very striking points in them must be ignored, before they can be described as barely "precepts of ritual." Some, no doubt, are little more, but others have sanctions of the most tremendous character, perfectly different from the brutum fulmen of a modern ecclesiastical sentence, and far exceeding the negative penalty of mere excommunication.

Esoteric rubric. I leave out of the question mere ceremonial formulas of which we have two, one of undoubted

Msr.³ ii. pp. 42, 44, 46, 50.
Hist. (Dickson, 1901), ii. p. 112.

the other of somewhat questionable antiquity. The Litanies of the Arval and Salian guilds are interesting as being probably, until the recent discovery in the Roman Forum, the oldest specimens of Latin extant. The Arval inscription is well known. It is given in C. I. L. and at the end of Freund's Lexicon. On the probably unaltered condition of the ancient carmen see Donaldson's Varronianus³, p. 232. I do not vouch for his translation of individual words. Only, as to the general form, I have this to say. What imperatives occur are merely rubrical directions for the officiating brethren or prayers to a Deity. They are purely esoteric, and no intention of legislating is to be thought of. The same is the case with the fragment of the Salian hymn given in Varro, L. L. 7. 27, which may be more modern¹⁸.

Alleged legislation of Numa, &c. So, too, in what is called an ordinance¹⁹ of Numa, that the priests are to have their hair cut with bronze, not steel, scissors, we have simply a glimpse into barbarous times, with which we may compare the prehistoric stone knife in Early Hebrew circumcision²⁰. No lex or ordinance seems even to be alleged in the story from the Ius Papirianum of the mensa in the temple of Juno Populonia serving for an altar²¹.

Lex of spolia opima. In the same esoteric class must also be placed the *lex* of the *spolia opima* attributed by Varro to Numa and said to be embodied in the Pontifical Books²². This *lex* specifies prophetically the sacrifice to be made, and the scale of reward to be given for the three several occasions on which a Roman general or a soldier under his command

¹⁸ See § 6, p. 236 and § 10, p. 365.

¹⁹ καὶ τοῦτο δὲ πρὸς τοῦ Νουμᾶ διατέθειται ὤστε τοὺς ἰερεῖς χαλκαῖς ψαλίσιν ἀλλ' οὐ σιδηραῖς ἀποκείρεσθαι. See Lydus, de mensibus, 1. 31, quoted in Bruns', p. 9, from Wünsch.

²⁰ See Exodus 4. 24-26.

²¹ Macrobius, 3. 11. 5, 6.

²² See the long note in Festus, F. pp. 186, 189, Opima (Müller). As to the genuineness of the lex, see Mommsen, Münzw. pp. 174, 175.

should take the spoils of the general of the enemy. It is scarcely necessary to go into an account of the first two—Romulus' capture of the spolia from Acron (Livy, 1. 10): Cornelius Cossus from Lar Tolumnius (Livy, 4. 20, 32). The "only begetter" of these stories is no doubt that M. Claudius Marcellus who, in the year 196 B.C., is asserted by Plutarch and Florus to have gained a similar victory over Britomarus or Viridomarus, King of the Gallic Insubres²³. This was no doubt a genuine exploit²⁴. How far there may have been some vague anticipatory direction in the sacred record, or whether the whole thing was got up for the visit of Augustus, accompanied no doubt, by the young Marcellus, we may doubt²⁵. I only quote the lex as a specimen of the sort of esoteric memorandum which actually was handed down from old times.

Other attributions to Numa. More purely religious directions are those attributed to Numa by Pliny²⁶—that no one should offer, in sacrifice, fish without scales, or sprinkle a funeral pyre with wine, or make libation with wine from an unpruned vine. These prohibitions are considered by our authority as made in the interest of economy and good husbandry, in which last point of view we may compare a curious rule in the "leges of the Laurentes" cited by Festus²⁷, that one may not take an armful of another's apples.

The original motive was rather to avoid incurring the anger of Heaven by irregular or improper proceedings. This is clearly the principle of the following prohibitions quoted also from the laws of Numa, and purporting to be in the original words. "Let not a pellex touch the altar of Juno:

²² Plutarch, Marcellus, 8: Florus, 1. 20. 5.

²⁴ See Livy, 33, 37 and Acta Triumph. A.U.C. DLVIII (C. I. L. i. p. 459 and note on p. 463).

²⁵ Cf. Livy, 4. 32 and Virgil, Aen. 6. 861-884.

²⁶ Pliny, H. N. 14. 12. 88; 32. 2. 20.

²⁷ Festus, P. p. 4, Armita; see Müller's note.

if she touch it, let her with loosened hair sacrifice to Juno a she-lamb²⁸." "If the lightning of Jove hath killed a man, let him not be raised above the knees (of his bearers)" and otherwise "If a man hath been killed by lightning, no funeral rites should be performed for him²⁹." So a man who had hanged himself, was to be cast out unburied—a rule however referred by our informant to the Pontifical Books generally, not to any royal legislator³⁰. I may add, though the connexion is slight, and no lex is referred to, the strange compensatory sacrifice of the porca praecidanea to be made to Ceres when the clod of earth due to the obsequies of a burnt body had not been duly rendered³¹.

The fragments recently quoted, the nature of which points clearly to their source—in the memoranda of a priesthood—are rather maxims than laws; statements of the religious feeling and sentiment current upon the matters to which they refer, and have scarcely a more authoritative aspect than those curious prohibitions which occur in the latter part of Hesiod's Works and Days. Express sanction there is none, but some minor degree of expiation is occasionally prescribed³². A practical sanction did of course operate, partly in fear of divine displeasure if the rule were violated and the customary expiation not made, more in reluctance to incur the disapproval, and lose the religious fellowship, of those among whom one lives. On all these grounds publication seems reasonable and likely on such rules, but not enactment.

It is, however, not impossible that some of the prohibitions originally dictated by purely religious feeling may have come,

30 Servius ad Aen. 12. 603. See C. I. L. i. p. 1418.

²⁸ Festus, P. p. 222, Pellices.
29 id. F. p. 178, Occisum.

²¹ Festus, P. p. 223, Praecidanea; cf. id. F. 218 and Varro, L. L. 5. 23.

³² I think, however, such a *piaculum* would have had to be invented, ex Tulli regis legibus, by a complaisant Pontificate, for the marriage of Uncle and Niece, Tacitus, Ann. 12. 8. The idea, says Tacitus, of hunting up penalties and expiations for incest, in the time of Claudius!

in later times, to do duty, by formal enactment, either as sumptuary or sanitary laws, or as minor regulations for public order and decency. This certainly appears to be the case with much of the burial law of the Twelve Tables (Tab. X).

There are in particular several alleged regulations, of which the original words are not quoted, attributed mainly to the legislation of Numa. It may possibly be suspected that some of these were later Senatorial ordinances, dignified with that honoured name. For instance, in the period of mourning, said to have been limited by him33, a further limitation was found necessary, at least for a time, after the disaster of Cannae³⁴. It is argued by Paulus, or Pomponius³⁵ that the year referred to, in the original limit of mourning, was one of ten months, which may give a reason for connexion of the rule with Numa, who ultimately, according to legend, added the two others36. The regulation, also attributed to him, which fixed the time of widowhood at not less than ten months (with the expiatory sacrifice of a pregnant cow for previous remarriage) was clearly made to prevent disputed questions of succession. This sensible rule might occur to very early priests or prophets, as might also the prohibition -said vaguely by Marcellus to be due to "a royal law"37of burial, in case of a pregnant woman, without the Caesarean operation being first performed—the reason given, that this were tantamount to murder, is probably due to the jurist.

⁸⁸ Plutarch, Numa, 12.

³⁴ Livy, 22. 56: Plutarch, Fabius Maximus, 18.

⁸⁵ Vat. Frag. 320, 321.

³⁶ Macrobius, 1. 13. 1, 4. ³⁷ Dig. 11. 8. 2

§ 18. REGIAE LEGES: PUBLIC WRONGS

Serious offences, p. 581. Order of development from sin to crime, ib. Sacer, Numa's general clause, 582. Dionysius on sacrum generally, 583. Athenian and Old German law, ib. Pronunciation of sacrum, ib. Sacrum adopted for civil purposes, 584. Protection of plebeian tribunes, ib. Festus, 585. Athenian druµia, ib. Minor offences expiable, ib. Aquâ et igni interdictio, ib. Patron and client, 586. Conclusion, ib. Sacratae leges, 587. Ultimate variety of sentences, ib. Offences within or against the family, 588. Boundary stone, ib. Sanction of the patria potestas, ib. Si nurus, Si puer, 589. Parricidii quaestores, 590. My interpretation of Numa's law, 591. The quaestores, ib. Result of rule on parricidium, 592.

Those of the religious maxims or rules referred to in the last section, which are in a sense exoteric, or general in their application, scarcely attain to the peculiar imperative character of law. Most of them either express no sanction at all, or at any rate treat infraction as a comparatively minor offence, reparable by an easy expiation. The offences with which I now come to deal are such as involve a general curse or pollution, only to be removed by the death of the offender. Therefore they are treated as public wrongs, to be visited with that penalty: the first rules to be formulated into law, at Rome as elsewhere, are in fact those which deal with public wrong.

And here we can, I think, trace an order of development from the time when the wrong is treated as primarily sin or offence against the gods of the community, to the time when it is treated as a violation of public safety, order or decency,

i.e. as an offence simply against the community itself. This at least tallies with what I believe to have been the constitutional order of development at Rome—from a mere conquering horde, through a body whose main cohesion was due to religion, with an administration of justice by religious authorities imperfectly sovereign, to a monarchy where a civil and military authority has supplanted and absorbed whatever administrative functions had been previously exercised by a Priesthood.

Sacer. The subject may be introduced by a penal clause attributed to Numa, and referring to some previous rule, of what nature we do not know: Si quisquam aliuta faxit, ipsos Jovi sacer esto1. If any man shall have done otherwise, he himself is to be devoted to Jove. The passage has been preserved by Festus, or his epitomator, simply for the sake of the old word aliuta, a feminine ablative used adverbially, like ita2. The old ipsos may be also remarked. Apart from its philological interest³, the use of an otherwise unnecessary pronoun points to some words, not preserved. on the confiscation of property4, which doubtless accompanied the personal penalty. We have plenty of instances of such a consecratio bonorum⁵. In the particular sin referred to below-a man's ploughing up his neighbour's boundary stone, the private wrong seems, as Blackstone says (iv. p. 6), to be swallowed up in the public. The public wrong is the curse on the community incurred by the offence against the divine protector to whom boundaries were dedicated (see Dionysius as cited in note 5).

¹ Festus, P. p. 6, Aliuta.

- ² Corssen², ii. p. 844.
- 3 id. pp. 236, 1028.
 4 See Jhering⁵, i. p. 278.

⁸ See Festus, P. p. 368. Termino...Numa Pompilius statuit eum qui terminum exarasset et ipsum et boves sacros esse. Cf. Dionysius, 2. 74, on devotion, in this case, to Zebs Oριος, and Deut. 27. 17. In the famous cippus of the Forum, I agree with Erman in regarding the IOVXMENTA as being part of the forfeited property of the offender who is here said to be devoted, by his offence, to Jove. Proc. Soc. Ant. xviii. pp. 404, 406.

Dionysius on sacrum generally. It is in fact stated by Dionysius, to have been a general custom of the Romans, when they wished any to be put to death with impunity, to devote their persons to some deity, a practice of which Romulus availed himself in the case of "petit treason" between patron and client, &c.6 The reference (italicised) to the lex tribunicia will be considered more particularly hereafter. The description of the general practice as followed by Romulus (note 6), indicates that this evidence dates from the very infancy of Rome, when that developed administration of penal justice, with which it is clearly inconsistent, had as yet no existence.

This devotion is similar to that retained, at least nominally, in Athenian law⁸, and said, by Blackstone, to have been anciently the plight, in effect, of an outlawed felon in England, who bore a wolf's head, and might be knocked on the head by any one⁹. Jhering quotes a similar case from old German law¹⁰.

Pronunciation of Sacrum. So extreme a penalty would seem to demand a public announcement (see Muirhead, p. 54). Accordingly, Dionysius evidently thought¹¹, and it has generally been considered, that this sentence required a distinct condemnation. There are several passages referring to the intervention of a publicus sacerdos and a contio (e.g. Festus, s.v.) which indicate that this may have been the original treatment of the case. Indeed, in very

[•] Dionysius, 2. 10. ἐν ἔθει γὰρ Ῥωμαίοις ὅσους ἐβούλοντο νηποινὶ τεθνάναι τὰ τούτων σώματα θεῶν ὁτωδήτινι μάλιστα δὲ τοῖς καταχθονίοις κατονομάζειν δ καὶ τότε ὁ Ῥωμύλος ἐποίησε. See above, § 7, pp. 262, 263. See also Plutarch, Romulus, 22, above, § 3, p. 75.

⁸ έναγης έστω τοῦ ᾿Απόλλωνος καὶ τῆς ᾿Αρτέμιδος. Aeschin. 69. 13.

Blackstone, iv. p. 320. See Coke on Littleton, ii. p. 128 b: Pollock and Maitland, i. p. 460, and the collection known as the Laws of Edward the Confessor, 6. 2. See too Genesis 4. 14, but see Robertson Smith, p. 252, n. 1.

¹⁰ Jhering, i. p. 281.

¹¹ Note his expression (2. 10) ἀλόντα and see Mstr. p. 901, n. 3.

early instances we find a tumultuary execution by "the people" at large: later it is left to individual zeal, or spite^{11a}. It becomes the right, perhaps the duty¹², of every member of the community to remove the curse from it, by the offender's death. An appeasing of the anger of the gods has, in fact, been held with some probability to be the original meaning of the Latin word supplicium which in its old use was proper for capital punishment^{12a}. This is a peculiar form of self-help, in which the individual rights himself, amongst the rest, by clearing all from the guilt towards Heaven (Jhering, ib.).

Originally, as we have seen, this doom would appear to have required some public pronunciation by priestly authority.

Sacrum adopted for civil purposes. But when a religious penalty is adopted and utilised for civil purposes, we may expect to find some amount of change, as will be seen in the treatment of parricida.

Protection of plebeian tribunes. In the more exceptional case of the political application of sacratio, or rather sacrum, as a penalty on violation of the person of a tribunus plebis, it is clear, as Jhering, with his usual vehemence, shews, that any waiting for a sentence is out of the question 13; immediate popular action being necessary. This is probably indicated in the well-known passage of Festus, where he tells us, with express reference to the lex tribunicia prima, that the homo sacer is, in this case, a man quem populus judicavit ob maleficium, which is not the proper description of a formal condemnatio 13a.

 ¹¹a Cf. Joshua 7. 25 with Leviticus 24. 16: later style Numbers 25. 7, 8.
 Phinehas is a true priest's hero, vv. 10—13.
 12 Jhering⁵, i. p. 277.

¹²a ib. p. 278 and Littré, s.v. supplice. Mommsen (Str. p. 916, n. 5) explains the word to indicate the physical bending of the head for decapitation.

¹³ Jhering, i. pp. 283, 284: Mommsen, Str. p. 937, n. 4.

^{13a} Festus, F. p. 318, Sacer mons. See Mommsen's distinction between Judicium populi and Judicium publicum, Msr.³ iii. p. 351, n. 2. Elsewhere he shews that even the former expression can only be applied to the im-

Festus. Nor is it proper for such a man to be sacrificed in a regular way (immolari), but any one who slays him is not condemned for parricidium: it being provided, by the law in question, that any who shall have slain him who is sacer by that plebiscite is not to be a parricida (i.e. murderer)¹⁴. This appears at first sight to be a general statement that the homo sacer is no proper ordinary victim; but it is, on examination, merely an interpretation of sacratio, or its consequences, in that particular enactment: i.e. in this case "killing is no murder¹⁵." A like interpretation is quoted by Demosthenes from some old Athenian law which placed a similar construction upon ἀτιμία^{15a}.

Minor offences. Some action, practically amounting to a sentence, by the head of the state religion, would seem to be more necessary, where the object was to announce or recognise the expiation proper for the offender in the minor cases, for which a partial sacrifice of his property was permitted to suffice. (This part of the priest will be noticed hereafter, under the subject of involuntary homicide.) I may be permitted, however, to refer to the function of Purifier which has been thought to be indicated by the term pontifex (putifex, see § 13, p. 421).

The later aqua et igni interdictio, which served to remove the offender from the community compromised by him, without taking his life, was according to Jhering¹⁶ a means

promptu action of the Plebs in case of outrage on a Tribune, "nur ausnahms-weise." See Jhering's parallel in Old Norse law, i. p. 282, nn. 188 b and c.

¹⁴ Festus, F. p. 318. neque fas est eum immolari sed qui occidit parricidi non damnatur: nam lege tribunicia prima cavetur "si quis eum qui eo plebei scito sacer sit occiderit, parricida ne sit."

¹⁵ Dionysius, 6. 89: Msr. 3 ii. p. 286, n. 2.

¹⁵a It is the case of a traitor to the cause of Hellas. "καὶ ἄτιμος" φησὶ "τεθνάτω." τοῦτο δὴ λέγει καθαρὸν τὸν τούτων τινὰ ἀποκτείναντα εἶναι. Cont. Phil. Γ . p. 122.

¹⁶ Jhering⁵, i. 277: Mommsen however rather favours the same idea. See his quotation from Cato's Origines, Msr. iii. p. 52, n. 2.

for avoidance of a curse similar to sacrum: but his explanation appears to me somewhat fanciful, as is certainly that of the slaughter of Remus by Romulus, which precedes it. The interdictio is a real opportunity allowed of evading capital sentence in an inelastic code, which did not empower an intermediate penalty.

Patron and client. The violations of family duty above specified, with their appropriate penalty, are also made to apply in the relation between patron and client, which was analogous to that of family, and is attributed by Dionysius, in substance as well as accidents, to Romulus. He represents, as we have seen, serious breaches of duty, in this relation, as checked by the sanctions of that king's "law of treason," under which the person convicted might be killed by any that would as a sacrifice to the infernal Zeus¹⁷. This law, at least as far as regards injury by Patron against Client, is attributed by Servius to the Twelve Tables¹⁸ and may well be one of the cases where an old customary rule has been recognised or reenacted by that legislation¹⁹.

Conclusion. I cannot therefore accept the view taken by Zumpt²⁰, that the date of the predominance of the religious element must be considered "pre-Roman," and already subject to the civil in the time of Romulus, unless that time nears the establishment of sovereignty in the house of Tarquin; and a similar opinion in Mommsen's History²¹ is scarcely enough qualified in his Staatsrecht. In the latter he seems to consider the effect of sacratio in historical times as little more than a declaration that the person is impius, which might have some religious consequences, but for any

¹⁷ See especially Dionysius, 2. 10.

¹⁸ Servius ad Aen. 6. 609. "aut fraus innexa clienti" ex lege XII Tab.
venit, in quibus scriptum est "Patronus si clienti fraudem fecerit, sacer esto." The strange word innexa looks as if Vergil did not understand the old general meaning of the word trans.
19 See Muirhead², p. 101, n. 5.
20 C. R. i. p. 128.
21 Hist. (Dickson, 1901), Bk I. chh. v. and xi.

civil or practical effect is prehistoric: "sacer esto" was, at least, only an actual sentence of death so long as the civil and religious authority were in the same hands²².

Sacratae leges. In a note almost immediately preceding that above quoted, Festus speaks of certain statutes as being sacratae when they have the particular sanction that whosoever contravenes them is to be sacer to some god with his familia and pecunia: these are, of course, the resolutions which the Plebs passed under a solemn oath on the sacred mount, which he gives alternately as an explanation of the epithet²³. The oath of fealty as Mommsen calls it, which replaced the solemnities of the leges proper²⁴, is simply a mutual engagement with one another to see that this penalty is carried out²⁵. The Tribunes and Aediles of the Plebs are said to be sacro sancti, and other plebeian resolutions are also called sacratae²⁶; all, I think, of a constituent character for the peculiar plebeian organisation.

Ultimate variety of sentences. A belief in the original reality of a plain Lynch law, or an individual execution of the doom, in cases of sacrum, does not preclude the supposition of a growing preference for special modes of death as proper for special cases²⁷. But the fuller developement of this idea probably belongs to a time when a Sovereign has taken the execution into his own hands. Whether any such characterisation was adopted by the first Tarquin or not, such a tyranny as that of the last usually delights in varied and fanciful sentences²⁸. The complicated horrors of the punishment for parricide^{28a}, which appear to have lasted

Msr.³ ii. pp. 52, n. 3, and 50.
 Mommsen, Str. pp. 552, 553.

²³ Festus, F. p. 318, Sacratae.

Mommsen, Str. pp. 552, 55

²⁵ Festus, ib. Sacrosanctum.

²⁶ Mstr. p. 552, n. 5.

²⁷ Bentham's characteristic penalties are an idea of this kind. Traités, ii. p. 178.

²⁸ Cicero, pro Rabirio perd. reo, 4. 13: Livy, 1. 49, 51: Dionysius, 4. 42. 46. 48: Dio, fr. 10 (Melber, p. 43).

²⁸a Mommsen, Str. pp. 922, 923.

through the Republic, being not very definitely abolished by the *lex Pompeia*²⁹ and evidently retained under the Empire³⁰, seem to belong properly to some such period.

Offences within or against the family. The fragments of the Regiae leges preserved to us, which have the penalty of sacrum, in some form, appended to them, mostly refer to offences against family duty or property³¹. Among the most conspicuous are those which deal with the sin of striking a parent. Their treatment must be clearly distinguished from that parental jurisdiction of which I have spoken elsewhere. Dionysius, who makes the patria potestas originate in an enactment of Romulus³², leaves ordinary violations of filial duty to the cognizance and punishment of the paterfamilias, against whom he does not apparently conceive rebellion possible.

Examples will at once occur, from the Old Testament, of the same feeling of sanctity attached to boundaries and to patrimony generally. It is possible moreover that the lands of a gens, which no doubt lay together, were divided into family portions by no more substantial boundaries than the imaginary lines drawn from post to post, which still with us often serve to divide small holdings of garden-ground: in which case the boundary stone assumes an importance scarcely intelligible to the owners of fenced and hedged estates. But in the fragments to which I am now referring it is the parental authority itself which is protected. The parent is evidently the complainant, and the penalty is due to the common religious feeling of his surroundings³³.

Livy, Perioch. 68: Cicero, pro Sex. Roscio, 25. 70: Mommsen, Str. p. 644. n. 3.
 Suetonius, Aug. 33, &c.

⁸¹ The boundary stone is no exception. See Dionysius, 2. 74. τοῦ μηδένα τῶν ἀλλοτρίων ἐπιθυμεῖν (τεκμήριον) ἡ περί τοὺς ὁρισμοὺς τῶν κτήσεων νομοθεσία. Cf. Deut. 19. 14: 1 Kings 21. 3: E. R. L. p. 53, n. 6.

³² Dionysius, 2. 26; and see above, § 3, p. 49.

⁸⁸ See above § 3, p. 52.

Festus³⁴ in illustration of the word *plorare* in its older uses quotes as follows: In the laws of Romulus and Tatius "If a son's wife (a lacuna) let her be devoted to the deities presiding over parents." In those of Ser. Tullius is this "If a lad beat a parent, and he complain, let the lad be devoted to the deities presiding over parents."

Festus' explanation of plorassit, though fragmentary, is enough to shew that he considered what is thereby expressed equivalent to a later indictment. In the first quotation the offence of the son's wife may be assumed to be similar in character to that of the son, and Donaldson supplies the lacuna accordingly (Varronianus³, p. 239). Giraud gives another suggestion in his Novum Enchiridion (p. 1) not, I think, equally good. Neither is necessary.

Apart from Romulus and Tatius, the high antiquity of this fragment, on internal evidence, has been already (§ 17, p. 574) remarked upon. The final d, it will be observed, does not occur in the *esto* of the second quotation, which is, in fact, attributed to a later king. I do not however think that any weight should be attached to this attribution, which may well be due to the story of Servius' tragic end. Both passages should be read together, and regarded as among our earliest expressions of national feeling and custom by Roman priests or judges.

I shall not spend time in considering Corssen's difficulties, i.e. about the grammatical form of *verberit*. As to *meaning*, it is an odd word to use. If cognate with *virga* (Curtius, p. 351) it indicates rather *insolence* than homicidal intent

²⁴ Festus, F. p. 230. Plorare. "Si nurus...sacra divis parentum estod." In Servi Tulli hace est: si parentem puer verberit, ast olle plorassit, puer divis parentum sacer esto. Id est inclamarit, dix[erit diem]. I adopt Müller's very probable restorations. Verberit is an old form (pres. indicative) of the 3rd conjugation (Schöll, Rell. p. 90: Corssen², ii. p. 404, note) Ast=at or autem (Festus, P. p. 6, s.v.). See Plautus, Capt. 3. 5. 25. Si ego hic peribo ast ille, ut dixit, non redit: at erit mi hoc factum mortuo memorabile.

(see parricida, § 19, App.), "If a son take a stick to his parent." But, in the important word which we now come to consider, the difficult derivation of which is too long to be inserted in my text, paricidas must mean originally a smiter, if not a killer, of a parent. It is in this word, and the substantive name of a crime derived from it, that I ventured, nearly 50 years ago, to trace at once an extension of the penalties on an original offence within the family, to a similar offence within the community and a definite transition from Lynch law to a criminal executive.

Parricidi quaestores, Festus tells us, was the name given to officers wont to be created for the search after capital offences. For the word parricida did not necessarily mean him who had killed a parent but him who had killed any man uncondemned. That this was so is shewn by a law of King Numa Pompilius framed in these words. If anyone do (lit. give) (or have done) to death a free man wittingly and maliciously let him be paricidas, i.e. amenable to the penalties of smiting a parent³⁵. This law is obviously the origin of the strange statements of Plutarch (§ 19, App. p. 604) and Cicero about Romulus and Solon.

The phrase dolo sciens—apparently intended to exclude accidental homicide, and all cases of killing justifiable by Roman law—is not, of course, part of the original fragment.

In Mommsen's view of parricidium which he takes to be, in itself, malicious homicide (see § 19, App. pp. 603, 607), this

³⁵ Festus, F. p. 221. Parrici[di] quaestores appellabantur qui solebant creari caussa rerum capitalium quaerendarum. Nam parricida non utique is qui parentem occidisset dicebatur sed qualemcunque hominem indemnatum. ita fuisse indicat lex Numae Pompili regis his composita verbis. "Si qui hominem liberum dolo sciens morti duit, paricidas esto." Duis is considered by Schöll to be future perfect. Cf. Festus, P. p. 66. Duis duas habet significationes, nam et pro δίγ ponebatur et pro dederis, and Plautus, Amphit. prol. 72, where duint stands in juxtaposition with viderint, ambiverit, &c. Corssen however, as in verberit, makes it pres. indic. (ii.² p. 402). The rare s in nom. sing. of 1st decl. has been noted above, § 17, p. 574, n. 11.

lex is a mere definition, in rather late juristic terms, of paricidas or, in other words, of parricidium. Something more specific is surely necessary to explain the stern old rule before us.

I take the so-called "law of Numa" to mean "If anyone has slain a free man uncondemned, let him be as one who has smitten a parent, i.e. be outlawed. We have here, as it seems to me, an interesting step in the developement of Roman criminal law. It is the employment of a primeval and well-established religious penalty directed against violence within the family, for the prohibition of malicious homicide within the community 36. The words paricidas esto do not simply, as Plutarch says (see § 19, App. p. 604), call a murderer a parricide, but by an early "legal fiction," treat him as one who has incurred the penalty of outrage on a parent. Conversely, when we come to the times of the Republic and the "first tribunicial law," its negative clause parricida ne sit means that the slayer of any one, who has become sacer under that law, is not to be held guilty of, or prosecuted for, murder.

In the passage then of Festus, taken as a whole, the custom or rule there described, not only treats murder as a religious offence, but, by recognising public officers whose duty was to track out, and proceed upon it (originally every man's business), negatives Lynch law and makes the offence definitely and expressly a *public* one irremissible by any person or persons aggrieved³⁷.

The quaestores parricidii were evidently very ancient officers, descending, according to Tacitus, from regal times³⁸, although there is much confusion of them with financial officers of the same name³⁹, and much not particularly useful discussion as to the King under whom they first existed

³⁶ See Zumpt, Criminalr. Abt. 1. p. 372 and notes.

³⁷ Jurisprudence, ii. p. 679.

³⁸ Tacitus, Ann. 11. 22: see above § 10, n. 39.

⁸⁹ Zonaras (reproducing Dio), 7. 13: Varro, L. L. 5. 81.

and the manner of their ultimate appointment⁴⁰. They were apparently permanent officers formerly appointed to track out and apprehend persons primâ facie guilty of parricidium which was evidently soon extended from its original meaning, not only to murder but to capital crimes generally41. They are detectives and prosecutors, but not judges. If this office is among the oldest magistracies, as Ulpian (l.c.) says, it would certainly be patrician, and in republican times, it is undoubtedly utilised for the removal of obnoxious plebeian champions, e.g., Sp. Cassius⁴². But considerable doubt is expressed by Mommsen, in spite of the evidence of Tacitus, as to the existence of quaestores parricidii under the kings at all. The question of these quaestores is discussed at length in my Early Roman Law, § 17, to the positions of which I mainly adhere. That of Mommsen, from which, with submission, I particularly dissent is this: the quaestores parricidii and the quaestores are not distinct, though the term quaestor is more proper for, and more likely to be originally applied to, the former. He considers that it was the functions of criminal enquiry which fell early (? 447 B.C.) into disuse and that it was on this account that Pomponius and Ulpian treat the holders of them as an early but extinct magistracy43.

Anyhow, the practical result of the existence and style of this early office, however it may have been afterwards extended, or rather limited, to a merely fiscal charge⁴⁴, is that parricidium, as the province of the quaestores, had come to cover not only murder generally but all capital crimes⁴⁵.

- 40 Ulpian, Dig. 1. 13. 1.
- 41 See Msr. 3 ii. p. 537, n. 1 and below, note 42.
- 42 Dionysius, 8. 77: Livy, 2. 41; also 3. 24, 29.
- ⁴³ Msr. ii. p. 538, n. 2, and E. R. L. pp. 79—81, where all the passages relevant are quoted in full.
 - 44 E. R. L. pp. 77, 78, 81, 82.
- ⁴⁵ See note $4\overline{2}$, supra. The last case quoted, however, in a very disturbed time, looks rather like the beginning of the occasional quaestiones, Livy, 9. 26.

But when, in course of time, the original province of the quaestores parricidii began to be occupied by special quaestiones, the word reverted to something like its more proper signification of murder of a relative, the scope of the original expression parens being considerably enlarged towards the close of the republic. The later chapters of the Criminal Law of Rome do not come under our present consideration: but the few earlier cases will be noted in the Appendix to § 19. I pass to the last stage of development under the Kings, in the remarkable case of perduellio.

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⁴⁸ About 80 B.c. Mstr. pp. 922, n. 1, and 644. nn. 1 and 2. This does not seem to have any connexion with the occasional use of the word *parent* in French, alleged by Bouhours, see Littré, s.v. Parent.

§ 19. REGIAE LEGES: PERDUELLIO AND PUBLIC WRONGS GENERALLY

Parricidium as a public wrong, case of Horatius, p. 594. Perduellio, etymological derivation, 595. What form of our treason, ib. Its probable arbitrary first use, ib. Lex perduellionis, 596. Perduellio later than parricidium, 597. Provocatio, ib. Horatius and the sororium tigillum: Mommsen's solution of the difficulty, ib. Republican cases of perduellio, 598. The duumviri and the appeal, 599. That of Rabirius, 600. Cicero, 601. Appendix on Parricidium, 602.

The natural and proper tendency of any organised government is, in the case at any rate of more serious public wrongs, to ensure punishment and to limit the anarchic method of its infliction, by taking the matter into public hands. In parricidium, as we have seen, practically = murder, the right or duty of pursuing the crime is removed to a public officer, and the matter therefore made incapable of private condonation. Had it been otherwise, the whole story of Horatius' murder of his sister would have been unmeaning. The father as the person mainly damnified by his daughter's death, and capable of executing punishment on her brother, might have waived his claim, but that would not now have been an end of the matter¹. The indirect

¹ Livy, 1. 26. patre proclamante se filiam jure caesam judicare: ni ita esset patrio jure in filium animadversurum fuisse. He does, in point of fact, make a piacular sacrifice, at the public cost, and institute the ceremony of the sororium tigillum, of which some monumental record was apparently preserved at Rome. Festus, F. p. 297, s.v.

pressure upon heredes to take proceedings on account of their ancestor's murder appears to be a matter of later juris-prudence². In the regal period this duty devolved upon the King's nominees, the quaestores parricidii (see however § 18, p. 591), and the officers whom we now come to consider, the duumviri perduellionis.

Perduellio is wrongly explained in one passage of Festus as if the prefix had merely an intensive sense³. It is really that depreciative or condemnatory per (meaning other, and hence wrong) which occurs in perjurus and perfidus, corresponding with some uses of the Greek mapa- and the German ver- (Gothic fair-). In this point of view perduellio or perduellis comes naturally to be "he who wars on the other, or wrong, side," i.e. an enemy, which elsewhere Festus tells us was the old meaning of perduellio, or rather perduellis4, so that the offence known as perduellio may be compared to that species or aspect of treason5 which consists in "levying war against our lord the King," or "being adherent to the King's enemies." The scope of this offence, which was probably created during the true regal period, possibly, as Cicero held, in the last reign5a, was no doubt widened, like that of our own law of treason, to an arbitrary and tyrannical extent⁶. This may have been the reason why it was softened by an appeal being allowed, in some cases, to the people: only, it would appear, at the discretion of the King⁷, though the lex

² Mommsen, Str. pp. 648, 649.

³ Festus, P. p. 66. Duellum...perduellio qui pertinaciter retinet bellum.

⁴ An obviously necessary emendation in Festus, P. p. 102, *Hostis*. See Gaius, Dig. 50. 16. 234. pr.: Varro, 5. 3; 7. 49: Livy, 45. 16, &c. &c.

⁵ 25 Edw. iii. c. 2: Blackstone, iv. pp. 81, 82.

^{5a} Cicero, pro Rabirio, 4.13. To save confusion I may say that the speech referred to under this name is the unfinished Oratio of 63 B.C. pro C. Rabirio perduellionis reo ad Quirites (Nobbe, p. 412) not to be confused with that pro Rabirio Postumo in 54 B.C.

⁶ For the wide use of this charge in the Republic, see E. R. L. p. 72.

[†] Dionysius, 3. 22, κράτιστον είναι διέγνω τῷ δήμω τὴν διάγνωσιν ἐπιτρέπειν, but see generally below, pp. 600, 601.

quoted by Livy seems in favour of appeal being a matter of course. This appeal is clearly the reason for the intervention of perduellio in the story of Horatius: while, on the other hand, the obvious connexion with the republican establishment of the right justifies us in placing this, the first purely secular offence, late in the regal period.

Lex perduellionis. But there are still indications of religious scruple which point to this lex, whether we call it ordinance or memorandum, being a sort of sequel to the older class of sanctions. I give the lex in Livy's words, below and the duumviri are to decide on the charge of perduellio. If the accused appeals from their decision he is to fight them on the appeal. If they win, his head is to be veiled, he is to be suspended by a halter to a barren tree: to be scourged either within or without the pomoerium.

On the duumviri I have to speak hereafter (p. 599). The details of the execution to my mind clearly indicate flogging to death as with the paramour of Floronia⁸. Mommsen takes it differently, making the infelix arbor a regular crux instead of the natural sense given above⁹. The provision that the execution may take place either within or without the pomoerium which Mommsen notes but leaves unexplained, is, I should suggest, made with a view to the avoidance of any supposed pollution of the sacred precinct by the execution of a criminal. It is only on account of this curious provision,

^{7a} Duumviri perduellionem judicent. Si a duumviris provocarit, provocatione certato. Si vincent, caput obnubito: infelici arbori reste suspendito: verberato vel intra pomoerium vel extra (Livy, 1.26). For Donaldson's restitution of the supposed original Saturnian form see Varronianus³, p. 240. The lex is clearly of Pontifical handiwork, but I should suggest a somewhat different restitution, i.e. si ab eis provocet ad populum certato si vincent duumviri caput obnubito infelici...suspendite verberato vel intra pomoerium vel extra.

⁸ Livy, 22. 57.

⁹ He quotes Cicero, pro Rabirio perd. reo, 4. 11. For *infelix arbor* in my sense see Livy, 5. 24. The idea probably is, not to spoil a useful tree by laying it under a curse.

which is apparently a genuine part of the original, that I have entered upon this somewhat repulsive subject^{9a}.

Perduellio later than parricidium. It is on intrinsic grounds, of progressive juridical development as well as on the connexion with the well-known republican provocatio that I place perduellio later than parricidium. It is, as we know, placed, in Livy's account of the Horatian legend, as a recognised offence with an established procedure in the reign of the third King. The question of the existence of quaestores parricidii in the regal period has been raised, and according to my view, not very satisfactorily answered by Mommsen (see last section). But an almost greater difficulty, in connexion with the same legend, remains. It has always been asked why Horatius' murder of his sister, a clear case of parricide, at least in the later sense, is brought against him as a charge of perduellio, at least in Livy's account.

Horatius and the sororium tigillum. In Festus' article on the sororium tigillum¹⁰ Horatius is accusatus parricidii apud duumviros and appeals from their condemnation on that count to the people, by whom he is acquitted. Mommsen's solution¹¹ of the difficulty about the charge of perduellio in Livy, though, in my opinion, weak in one point, is the best that I can find.

Poetical justice, or popular sentiment, requires that Horatius must be saved from the penalties of his act. Now that can be done only through some charge and some intermediate judgement—admitting of provocatio. These are supplied by Livy in perduellio and the duumviri: and this

^{9a} See the passage 4. 11, above referred to, in Cicero's pro Rabirio perd. reo. The pomoerium (undoubtedly as Varro makes it post-moerium, L. L. 5. 143) meant originally the space left clear beyond (not behind) the wall, as post-liminium meant the space beyond the threshold, or border. But the Romans themselves had difficulties on these subjects. See Festus, F. p. 218, Post-liminium and 249, Posimoerium.

¹⁰ F. p. 297.

¹¹ Mstr. p. 528, n. 1.

is the clemens legis interpretatio of King Tullus, which has no direct application to the lex, but which I consider to be a merciful construction of the crime, treating a clear case of murder as a doubtful one of treason, upon which the popular accused was sure to be acquitted^{11a}.

But to say, as Mommsen does, that, according to the older tradition, the quaestors did not belong to the regal period, and were therefore not available to Tullus, seems to me insufficiently established for an argument: while to maintain that the act is in truth not perduellio, but will be visited with the penalty of perduellio is no more reasonable than to call the lamentation of the girl for her slain lover treason to her country. To my mind, the article on the sororium tigillum clearly assumes the existence both of quaestores and duumviri, the former as an ordinary, the latter as an extraordinary office 12a.

Republican cases of perduellio. As in the regal (above p. 505) so in the republican period, and not merely in the acuter early stage of contest between patrician and plebeian, perduellio was taken in a conveniently extensive sense. This was the form of indictment brought against Sp. Cassius and M. Manlius, both destroyed on the ground regni affectandi, 485 and 384 B.C.¹³: against Cn. Fulvius for bad management and cowardice in military command, 211 B.C.¹⁴; against Ti. Gracchus and C. Claudius for breach

¹¹a See E. R. L. p. 74.

¹² In Dionysius' account (3. 22) the accusers of Horatius are τῶν πολιτῶν ἄνδρες οὐκ ἀφανεῖς. Nothing is said of duumviri or perduellio, but this is the first judgement on a capital case entrusted to the Roman people, who acquit Horatius on the charge of murder. Nevertheless the king requires his further expiation by the erection of the two altars as described in Festus; to which Dionysius adds some particulars as to the position of the tigillum, in a street leading down to the vicus Cyprius, near the present Coliseum (Burn, Rome and Campagna, p. 230).

¹⁴ id. 26. 3. In the tumultuary affair of the Carvilii and Postumius 212 B.c. there is no mention of perduellio or dumnviri. Livy, 25. 3—5.

of the respect due to a tribune^{14a}. It would appear that the intervention of duumviri and condemnation by them was almost a matter of course, the charge being practically brought in the first instance before the popular assembly: also that any violation of a high constitutional principle or any gross dereliction of duty in a public officer could be brought under this compendious form of accusation. But the instances of procedure are rare, and there is latterly no certain case of the appointment of duumviri till the accusation of Rabirius for the death of the tribune Saturninus 37 years after the event: Saturninus being killed 100 B.C., Rabirius tried before the people in 63 after condemnation through duumviri irregularly appointed by the practor15. This was apparently a mere furbishing up of the rusty ancient procedure for a party purpose: the coup d'état, in which Saturninus fell, might fairly be treated, from its magnitude and tumultuous character as not an ordinary murder, and an infringement of the dignity (majestas) of the Roman people is probably involved. in the murder of a tribune. This principle does not apply very well to the case of Fulvius (p. 598), and certainly does not to that of Horatius: as to which I can see no reason for its being treated as perduellio but that given above16.

The duumviri and the appeal. The duumviri are originally judges, not accusers or periodically elected detectives, but appointed specially for the occasion. The name indicates the man or men of two (Gen. Dual, Corssen², i. p. 268: Roby, Gramm. i. p. 442), as I venture to suggest of two peoples (see § 3, p. 103; § 6, p. 245, &c.). If the last suggestion is correct it would tend to set back perduellio as a criminal

¹⁴a Livy, 43. 16.

¹⁵ Dio, 37. 27. Instead of being elected by the people. They are *facti* in the case of Horatius, *creati* in that of Manlius, Livy, 6. 20. Neither expression excludes the possibility of a subsequent *lex curiata* (E. R. L. p. 81 and above, § 10, p. 368).

¹⁶ p. 598.

charge to the days of the union of the two original national elements, and the first Tarquinian King. In any case I am disposed to believe the duumviri to have been a very ancient appointment, intended originally as a popular protection against, rather than an instrument of, royal power. They appear, however, to have become the latter; and their province to have been limited to a mere finding of fact, not extending to any question of justification¹⁷. This bare finding of a true bill or primâ facie case, appears to have ended in these judices becoming practically accusers in the first instance before the court of the people. This is the action of Sempronius with regard to Cn. Fulvius^{17a} though the trial (the accused withdrawing into exile) does not take place as it does in the cases of Cassius and Manlius (n. 13).

In the one later historical instance which we have, the trial of C. Rabirius before the comitia centuriata, the direct accuser is Labienus a tribune, the duumviri being the mere instruments of an unconstitutional condemnation of a Roman citizen, without a hearing by the Roman people¹⁸. So far as I can follow Cicero's oratorical exaggerations, he objects, not merely to the appointment of these particular duumviri (the two Caesars) but to the procedure of perduellio, in toto, for the abolition of which he says he cannot take sole or first credit, after the laws of Valerius, Cato Major, and C. Gracchus^{18a}. All this is matter for later history.

As to the regal period all that we can assert with some degree of confidence is that an arbitrary extension of the

¹⁷ Such was the opinion of Gruber, based on the expression of Livy (1. 26), qui se absolvere non rebantur ea lege, ne innoxium quidem, posse. Zumpt (Criminalr. i. p. 97) accepts this interpretation, but makes it depend upon the allowance of appeal to the people.

¹⁷a Above, n. 14.

¹⁸ Cicero, pro Rabirio perd. reo, 4. 12. hic popularis a duumviris injussu vestro non judicari de cive Romano, sed indicta causa civem Romanum capitis condemnari coegit.

¹⁸a ib. 3. 10 and 4. 12.

regal power was attempted in the introduction of procedure on perduellio, and that the appointment of duumviri, probably originally intended as a check on this, failed to act as such, and was supplemented by allowance of appeal from them, which was practically an appeal from the King, whose personal dignity was however saved through this not being done formally and directly. These two facts seem to be established by words which Livy puts into the mouth of the father, M. Fabius, addressing the dictator Papirius, 322 B.C., and by the express statement of Cicero referring to the obvious literary source of our, and Livy's, lex perduellionis¹⁹. There is another explanation of the tyranny of Superbus²⁰ than the refusal of appeal, but it appears to me to be an obvious anachronism or a reference to a prehistorical developement of regal power²¹.

In the regularisation of the question of appeal from capital sentence consists, as we shall see, the principal change from the regal to the republican administration. From what we hear in the repeated treatment of that question, we may infer fine and flogging to have been minor punishments, competent to the magisterial authority in regal times, for the class of offences against public order not amounting to matters of so serious a character. There are certain archaic sentences strangely retained in the Twelve Tables, on which I shall speak more fully when I come to that legislation. I pass now to the subject of Private Wrongs, and what general treatment we can with any probability assign to a prerepublican period.

¹⁹ Livy, 8. 33. Videro cessurusne provocationi sis cui rex Romanus Tullus Hostilius cessit: Cicero, de Rep. 2. 31. 54. Provocationem etiam a regibus fuisse declarant pontificii libri; significant nostri etiam augurales.

²⁰ That he tried capital cases sine consiliis per se solus, Livy, 1. 49: Dionysius, 4. 42.

²¹ See above, pp. 380, 382, also Msr.³ ii. pp. 310, 313, n. 1.

APPENDIX TO § 19

PARRICIDIUM

Derivations of Priscian, Festus, Quinctilian and Lydus, 602. Of Ortolan and Colquboun, 603. Of Mommsen, ib. Plautus and perenticida, 604. Striking a parent, Roman view, ib. Greek, 605. Penalty inflicted by Superbus, ib. Dog, cock, &c., ib. L. Hostius, ib. Publicius Malleolus, 606. Twelve Tables or Midrepublican lex, ib. Mommsen's account of specialisation of particidium, 607.

The derivation and the original meaning of this word have been much disputed among moderns, and the subject is confused amongst classical writers, and possibly republican legislators, themselves, on the one hand by questionable derivations, on the other by inferences drawn from the undoubtedly old fragment of law which I shall shortly have to consider. To form, however, any definite opinion upon the rendering and significance of that fragment, it is necessary to make up one's mind as to the original meaning of the old compound paricidas of which the last part is fairly clear but the first extremely doubtful. As this involves a considerable amount of etymological reasoning it is placed in an appendix.

Three derivations are given by Priscian; from par, pater or parens²². Festus is, as we have seen by the passage above quoted²³, in favour of parens: Quinctilian, implicitly, of pater²⁴: this is the derivation preferred by Skeat. Lydus (a very poor authority) assumes the existence of two forms,

²² Priscian, 1. 33. 23 § 18, n. 35.

 $^{^{24}}$ Quinctilian, Inst. Or. 8. 6. 35. parricida matris quoque, aut fratris interfector.

one, with the a long, meaning murderer of a citizen (pārens = subject), the other with a short, meaning murderer of a parent (părens), and both spelt with double r25. Sir P. Colquhoun drew a distinction between paricida with one r and parricida with two, the former being, from par and caedo the murderer of an equal (i.e. a citizen, not a slave) the latter from pater and caedo the murderer of a father26. Ortolan attributes to parricidium the signification of paris-cidium, without any distinction of single or double r and translates meurtre de son semblable²⁷. Against this philosophical ("recht unrömisch," Mommsen, Str. l.c. n. 29) derivationapparently accepted by Huschke²⁸—apart from the difficulty in the quantity of the a is the absurd tautology to which the lex would be reduced "If any slay a free man, let him be the slayer of his fellow, or like." The distinction drawn by Colquhoun is not found, to my knowledge, in any ancient writer, nor could any reliance be placed on the use of a single or double letter in so early a word. The difficulty of the derivation from pater is one which would occur rather to a modern than to an ancient etymologist. It lies in the fact that tr is a stable combination: at least we find no good Latin instance of a t assimilated to a following r.

The explanation favoured by Mommsen, after Osenbruggen, is that the first syllable means crafty or malicious (arg), being identical with the per (= other or wrong) in perfidus, perjurus and perduellis²⁹. This explanation agrees

²⁵ Lydus, do magg. 1. 26. παρρικίδας δε 'Ρωμαΐοι όμωνύμως τούς τε γονέων τούς τε πολιτών φονέας άποκαλουσι, παρέντες έκατέρους προσαγορεύοντες διαφοράν δε έπι της έπωνυμίας ταύτην παρέχουσι τινα συστέλλοντες γάρ την πρώτην συλλαβην και βραχεΐαν ποιούντες τούς γονέας, έκτείνοντες δε τούς ύπηκόους σημαίνουσι.

²⁶ Colquhoun, Summary of the Roman Civil Law, pt 1, § 40.

²⁷ Ortolan, Histoire, § 95.

²⁸ Huschke, Multa, p. 183, explains it as der Mord seines zugestellten Gleichen.

²⁹ Msr. 3 ii. p. 541, n. 2, but see Str. p. 612, n. 3.

in meaning well enough with the dolo sciens of the law (whether a later addition or original) and also with the fact that, in other early law, it is rather the covert and secret character of the killing than the killing itself which constitutes murder. But while it does not make much sense of Numa's law, in point of derivation it leaves the long a, or double r, unaccounted for, by the side of pĕraeque, &c.

On the whole, I am disposed to trace the word to parenticida, with a compensatory lengthening of the a, or doubling of the r. Plautus' comic perenticida (cutpurse) (Ep. 3. 2. 13) is a strong argument for parenticida being a form natural to the ears of his time, as there is certainly nothing in pera, purse, to suggest the nt.

The latter part of this compound must, I suppose, after Corssen's very decided expression of opinion on caedere be taken to mean, not striking down or felling (the true derivation of which last word from fall leads, Corssen says, to a false derivation of caedere from cado), but cutting or woundingnot necessarily killing30. The idea of cutting may be pressed too much-caedere in the old phrase pignora caedere is simply to smash. The violent striking of a parent is what constitutes the paricidas: we may compare the verberit, in the si puer clause, with Virgil's pulsatusve parens, Aen. 6. 609. That striking, not killing, a parent, was what was specified in old Roman law, may be gathered from the strange statement of Plutarch that Romulus enacted no law against actual parricide (in the modern sense) but called all murder by that name³¹. Striking a parent, was evidently treated as the ne plus ultra of human outrage conceivable. A similar expression of the minor, and reticence on the major, offence is

³⁰ Corssen, Beiträge, p. 453. On fell, Skeat.

³¹ Plutarch, Romulus, 22. ίδιον δὲ τὸ μηδεμίαν δίκην κατὰ πατροκτόνων ὁρίσαντα (τὸν Ῥωμύλον) πάσαν ἀνδροφονίαν πατροκτονίαν προσειπεῖν ώς τούτου μὲν ὅντος ἐναγοῦς ἐκείνου δὲ ἀδυνάτου.

observable in the Greek πατράλοια, thrashing a father and the statement of death inflicted on one who τὸν πατέρα...ἔτυπτε³². Cicero, in fact, in his speech for Sex. Roscius, accused of murdering his father³³, attributes the same abstinence from legislation against the murderer of a parent to Solon, but contrasts it with the greater wisdom of "our ancestors" who devised the sack and the drowning in a river or sea. This is said by Dionysius to have been inflicted by Superbus upon one M. Atilius, ὡς πατροκτόνον, a faithless custodian of the Sibylline books³⁴.

The ghastly companions of the condemned—the dog, cock, viper and ape referred to by Juvenal ³⁵—are said by Modestinus to be matter of ancient custom ³⁶. They are quite possibly the fancy of some mad emperor like Caius. The comparatively humane alternative of exposure to the beasts was allowed by Hadrian, if there were no deep sea handy. He seems therefore to have confirmed the old custom quoted by Modestinus ³⁷.

The first actual case of murder of a parent, says Plutarch³⁸, moralising on the legislation or non-legislation of Romulus, was that of one Lucius Hostius, after the second Punic war.

⁸² Petit, Leges Att. 2. 4. 14, particularly the passages cited from Lysias (c. Agoratus 23) and Diogenes Laertius, Solon, § 55.

⁸⁸ Cicero, pro Roscio Amerino, 25. 70.

³⁴ Dionysius, 4. 62. The difficulty is obvious, how a plebeian could be so ἐπιφανής an ἀνήρ (§ 5, App. 1, p. 174). He becomes a Tullius in the same story told by Valerius Maximus (1. 1. 13). According to him the same (v. 23) punishment was inflicted on parricides multo post...lege: there is an altera lectio with non.

³⁵ Juvenal, 8. 213, 214. Cicero says nothing about them in his speech pro Roscio Amerino.

⁸⁶ Modestinus, Dig. 48. 9. 9. Not in the lex Pompeia, ib. 1 and 48. 8. 3. 5.

³⁷ Dig. 48. 9. 9. pr. This constitutio may be the *lex* referred to by Justinian (4. 18. 6), incorrectly as the *lex Pompeia*; but not by Valerius Maximus who wrote before Hadrian's time.

³⁸ Plutarch, Romulus, 22.

This evil distinction, however, is also claimed for Publicius Malleolus who murdered his mother 101 B.C.39 This historical case is, no doubt, the one quoted by Cicero40 in his youthful work, de inventione, as an instance of a valid will made by a man under the peculiarly disabling circumstances of this particular death sentence. In the passage of the Auctor ad Herennium, here made use of by Cicero⁴¹ a lex is cited which specifies the muffling up and binding of the criminal who is to be cast into a running stream. This is sandwiched between genuine fragments of the Twelve Tables, so that it might be held to belong to that code: but it is regarded by Schöll as an editor's interpolation⁴². On the other hand the statement of Festus43, that the direction obnubere caput of the murderer of a parent comes from a statute and that a very old one is probable enough, seeing that the same phrase is used in the lex perduellionis. On the whole, though it is not probable that there would be any specific provision for actual parricide, at the time when parricidium was used in a very wide sense, or in the comparatively recent period of the Twelve Tables, I do not think such a provision is unlikely in a period of great depression and of strange piacular remedies, as in the Hannibalian crisis44. The original idea seems to be that of depriving the criminal of all community with any of the elements45. It appears to be of this punishment, as inflicted for murder, that Plinv is speaking when he compares it, as less severe, with the lingering death of the harvest thief46.

³⁹ Livy, Perioch. 68.
⁴⁰ Cicero, de inventione, 2. 50. 149.

⁴¹ Auctor ad Herennium, 1. 13. 23.

⁴² In the ad Herennium. Schöll, Rell. pp. 53, 54. Mstr. p. 643, n. 6.

⁴³ Festus, F. p. 189, Nuptias. The impossible parenstum of Müller is amended by Egger (Schöll, p. 55) pervetustam.

⁴⁴ Livy, 22. 57.

⁴⁵ Mstr. p. 922, n. 2: Theoph. on Inst. 4, 18, 6.

⁴⁶ Pliny, H. N. 18. 3. 12.

Mommsen, in accordance with his derivation of parricidium (above, p. 603), does not accept any such view as its derivation originally from an offence within the family, but takes it to have been simply and properly murder, or malicious homicide; the scope of the word being narrowed or particularised in the later republic⁴⁷ to murder of a relative.

47 Mommsen, Str. l.c.

§ 20. REGIAE LEGES: PRIVATE WRONGS.

Private wrongs, p. 608. Exceptional scope of civil remedies at Rome, ib. Self-help, 609. Delicts, 610. Differ from self-defence, ib. Involuntary homicide, 611. Law of Numa, aries, &c., ib. Talio, 614. Poena, 615. Lampoon, 617. Fur manifestus, ib. Contractual obligation in regal period, ib. Quasi-contractual, 618. Quasi-delicts, 619. Ground for real actions, ib.

I come finally to a brief consideration of the very slight amount of legal rule or practice which we can trace in the regal system on the subject of private wrongs, apart from the projected reforms of Servius mentioned at the end of § 16 (pp. 537 sqq.) which apparently were not carried into effect or only endured for a very brief time.

I mean by private wrongs such as are not either indirectly prejudicial to the community as being offences against heaven or directly so, as breaches of order, antagonism against the government or depreciation of the public dignity; but simply offences against the person or property of the individual, which are therefore only prosecutable in the interest of the person aggrieved and are therefore remissible by him.

On this subject the exceptional scope of civil remedies in Roman law has always attracted remark. Many acts which are so obviously prejudicial to the interest of the public that all modern nations treat them as crimes gave rise at Rome, in comparatively late times simply to obligationes ex delicto and were exclusively matter of private prosecution. This was no doubt partly due to the excessive severity of the early public

penalties, with their monotonous repetition of death, however varied in grotesqueness and horror; partly to the inconvenient and dilatory procedure of the Court of Centuries, before whom all the more serious charges, as open to appeal, must necessarily come. But I am disposed to trace the peculiarity, of which I speak, almost as much to the primeval admission of a right of private vengeance or self-help, in cases of offence against person or property-perhaps against reputation-and to the early date, before such admission became obsolete, of the codification of old law or custom in the Twelve Tables. Why the criminal jurisdiction was so long in extending itself I shall endeavour to shew hereafter. It is only very late in the period of classical jurisprudence when the principle began to be established that such acts might be criminally prosecuted as well, and that the bringing of a civil action should not necessarily be a bar to the criminal proceedings or vice versa.

Self-help. This rough and ready treatment of private wrong is part of what has been generalised by modern writers as the principle of self-help, and it has been sometimes extended to apply to the Roman mancipium from which it ought to be distinguished. The abstract Roman idea of mancipium (I do not mean the technical hand-grasp of conveyance) is taking by the strong hand in what is assumed to be a state of war, i.e. acquiring by capture the property of a public enemy. The self-help of which I am now speaking is an exercise of power by the offended person against the offender, within the same civil community, in time of peace—an exercise of power recognised and supported by the general feeling of that community. Jhering² calls this a Folksjustice based upon a Folks-moral.

¹ I differ from Muirhead', p. 60, in more than one point. See amongst other things Goudy's excellent note 23.

² Jhering⁵, i. pp. 122, 123, 175.

This principle occurs in most early societies before the more fully organised administration of justice by officials. It is particularly apparent in Roman legal history, where it long survives as the auxiliary or alternative to formal legal remedies. Nor do we find, in fact, any express declaration against it till the end of the republic or establishment of the empire, in the lex Julia (of Caesar and Augustus) de vi privata3 and the decretum of Marcus Aurelius4.

Self-help, regulated, it is true, and formalised, but still the forcible act of a private person, lies at the basis of vindicatio in the actio in rem-originally the physical manifestation of power over what we allege to be our own property, ultimately reduced by practice into a formal claim⁵. It is conspicuous in the seizure of a pledge, pignoris capio, at least in the older and less solemn uses of it said to be introduced moribus6. It bulks very large in the Decemviral law of civil procedure, notably in the manus injectio of execution (see below).

Delicts. But its most remarkable manifestation is in the case of those private wrongs, unconnected either with dispute as to property or contractual relation between the parties, to which the name of delict came to be specially applied, and, in particular, in the case of offences against the person.

Self-defence against unjustifiable assault, as Paulus says on the lex Aquilia7, all statutes and all rules of customary law allow. But there is more than self-defence in the practice of which I am speaking—the practice recognised by almost all early peoples-of personally exacting satisfaction

³ Girard⁵, p. 969, n. 2: Dig. 48. 7. 5. 8.

Dig. ib. § 7 and 4. 2. 13.

⁵ Gaius, 4. 16.

e id. 4, 27. These are referred by Livy (1, 43) to Servius. Cf. Cicero de Rep. 2. 20. 36 and 19. 34.

⁷ Dig. 9. 2. 45. 4.

for the wrong done, either by way of revenge, or compensation, or both8.

The early ordinances or statutes of Rome dealing with delict consist largely in regulations and limitations of this practice, in suggesting its avoidance by agreement, or in enforcing a specified composition for the right of vengeance.

Involuntary homicide. In what is probably part of the oldest Roman enactment on Delict or Crime, the right if not the religious duty to exact vengeance for a relative's death though not intended, is clearly recognised, but provision is made for a compulsory settlement of the matter by peaceable means.

This is the case of composition or atonement for involuntary homicide under a rule retained or re-enacted by the Twelve Tables⁹, but evidently of far earlier origin. It is, in fact, directly attributed^{9a} to the same mythical legislator as the law making voluntary homicide parricidium above cited(§ 18, n. 35), of which it would appear to be a subsequent paragraph.

Our authority is Servius, the commentator on Virgil, under Eclogue 4. 43¹⁰. It was provided (says he) in the laws of Numa that, if any one had unintentionally killed a man, he should for the life of the slain present to his agnati a ram in public meeting. On the quaint illustration of want of intention preserved in the XII—doubtless from the old books^{10a}—I shall speak when I come to the corresponding clause in that code.

Jhering, i. p. 124: Girard⁵, pp. 393, 394, n. 1.

⁹ Tab. 8. 24. See Muirhead², p. 102.

Servius in Eclog. 4. 43. In Numse legibus cautum est ut si quis imprudens occidisset hominem pro capite occisi ejus in contione offerret arietem. On Huschke's emendation, agnatis, see § 4, n. 34. See further Servius on Georg. 3. 387.

¹⁰ E. R. L. pp. 49, 50.

¹⁰⁸ Commented on by Cicero (Top. 17. 64).

I have adopted, with most modern editors, Huschke's emendation agnatis ejus in contione for et natis ejus in cautione¹¹. The words et natis cannot stand and may very well have arisen from ac natis a clerical error for agnatis. Accepting this reading as Muirhead does, I cannot understand his declining to admit it as evidence of predecemviral agnati in the ordinary sense of the word.

The verb offerret does not indicate more than a presentation or tender to a human being, the absolute sense of offering a victim (to heaven understood) being late if not peculiar to Christian Latinity.

The original reading of Servius "in cautione" which Schöll^{11a} appears to retain might bear the meaning "by way of security," i.e. for further or other satisfaction, though one would have expected "in cautionem." Such a meaning might be reconciled with the Greek money payment (\piouv\eta) for manslaughter, which forms the subject of the dispute in the well-known case represented on the shield of Achilles (above § 13, p. 424) and with our own vergild and similar payments in other northern legal antiquity. It is not clear however that this was the Roman view of such a case, and the idea of earnest or part payment is scarcely satisfied by the ram¹², for which and for other reasons the reading in contione is generally preferred. The offer and the presumed acceptance are required to be made under circumstances of publicity and official presidency¹³. While the contio does not quite

¹¹ Above, p. 111. ^{11a} Rell. p. 150.

¹² Is the aries which "subicitur in vestris actionibus" (Cicero, l.c. n. 10a) thrown under, subjected, Roby Gr. ii. § 2135, or smitten in substitution, ib. 2136? Festus is inconclusive. Cf. Subici, F. p. 347 and Subigere, ib. p. 351. Even in the latter Antistius (Labeo) is quoted as rather in favour of the vicarious slaughter "qui pro se agatur, caedatur." See however E. R. L. p. 50, nn. i and j. The coincidence of Genesis 22. 13, though curious, must be merely accidental.

¹³ Festus, P. p. 38. Contio significat conventum non tamen alium quam eum qui a magistratu vel a sacerdote publico per praeconem convocatur.

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amount to a Court like that of the Anglo-Saxon hundred14, it is something more than the chance spectators who side with this or that disputant in the Homeric trial-scene before the regular Court is assembled 15. It may be not unreasonably inferred from this passage that all homicide was recognised at Rome as a special wrong to the family of the deceased, and as giving them a right, perhaps imposing a duty, of blood revenge. Where the killing was voluntary the right to exact this penalty was, according to my view of the law, paricidas esto. shared with all other citizens; though this Lynch law was doubtless after the institution of quaestores parricidii merged in the prosecution of the offence by the Sovereign or his officers. Anyhow it was incapable of private condonation (see § 19, p. 594). Where, on the other hand, the killing was involuntary, it appears, strange as it may be to our notions, that the relatives had in very old times a similar right or duty, but one which belonged and continued to belong to them alone. This avenging of blood, even when the killing was purely accidental, has its parallel in the Hebrew records and in other ancient national histories16. But the exercise of such a right, even in that approximation to a civilised state represented by the régime of Numa is almost inconceivable, and might apparently after the establishment of the rule "si qui...paricidas esto" have been itself a capital offence. Hence a form of condonation was provided by authority which we must suppose the relatives were obliged to accept. It was their sole affair—a case of private wrong remissible by the party injured. The publicity required (contio) may have been in old times to guarantee the slaver from further proceedings on the part of the slain

¹⁶ Stubbs, C. H.6 i. p. 116: P. and M. i. pp. 18, 515.

¹⁵ Iliad, 18. 502: Maine, A. L. p. 377. Above, pp. 394, 424.
¹⁶ Numbers 35. 23: Deut. 19. 5. The case of Patroclus in Iliad, 23. 86, 88 is not the same, being one of homicide in childish passion.

man's relatives. I incline, with Jhering¹⁷, to think that it is rather in the interest of the latter, to shew that they have not neglected their family duty.

Muirhead holds that the reenactment of this "law" in the Twelve Tables was "merely intended to stay the prosecution which it was incumbent on the kinsmen of a murdered man to institute¹⁸." I do not exactly understand this. Such legal prosecution would only lie for murder, i.e. intentional homicide. In that case no doubt a special duty to institute the prosecution would naturally be held incumbent on the kinsmen. The particular pressure which was exercised upon the heredes has been mentioned above 19 but all this appears to be matter of later jurisprudence. As to the slaughter of this ram, it is perhaps not merely the revenge of the kindred 19a, but due to some idea of the wrath of heaven against even an innocent shedder of innocent blood having to be appeased in his interest²⁰. This is not to be concluded, as we have seen. from the word offerre above, p. 612, but may rather be gathered from other expressions of Servius and Festus. So in old Athenian law the involuntary homicide must not only conciliate some one representing the relations, so as to escape their vengeance, but also make a purificatory sacrifice21.

Talio. Passing to minor cases, where life has not been taken, and the religious question does not come in, but some bodily injury has been inflicted, we come to the wide-spread principle of talio—infliction of an equivalent injury upon the offender by the person hurt²². There is no question that

¹⁷ Jhering⁵, i. p. 188

¹⁸ Muirhead², p. 102.

¹⁹ § 19, p. 595.
^{19a} The view of Jhering, i. p. 187.

²⁰ Mommsen, Str. p. 85, makes the aries a piaculum.

²¹ See Demosthenes, c. Aristoc. 643, 644, with Harpocration's explanation of $\Lambda i \delta \epsilon \sigma a \sigma \theta a \ldots \dot{a} \nu \tau l \ \tau o \hat{v} \ \dot{\epsilon} \xi i \lambda \dot{a} \sigma a \sigma \theta a \iota \ \kappa a l \ \pi \epsilon \hat{\iota} \sigma a \iota \ \tau l \ o \mathring{v} \nu \ \dot{o} \ \nu \dot{o} \mu o s \ \kappa \epsilon \lambda \epsilon \dot{\nu} \dot{\epsilon} \iota \ldots \delta \iota \dot{\eta} \rho \eta \kappa \epsilon \nu$. E. R. L. p. 50.

²² There is no doubt about the meaning of the word, though Isidore's etymology (Orig. 5. 27. 24, ut taliter quis patiatur ut fecit) has been questioned. It is not accepted by Skeat, s.v. Retaliate.

this usage existed in predecemviral times, from its retention under its bare name without explanation, as something well known, in the Twelve Tables, for more serious cases of bodily injury, where the parties cannot agree upon a compensation²⁸.

Talio itself, was, as has been well remarked by Jhering and Cuq²⁴, a practical limitation by custom of the free practice of revenge generally to a specified and particular satisfaction. It was an extremely barbarous and archaic form of satisfaction, but there is no reason for supposing that it was not actually enforceable in certain cases under the XII. The words are clear, nor, as reported to us, do they seem to distinguish in any way whether the injury was intentional or not²⁵.

Talio then in spite of its harbarity may be justly styled a regulated self-help or self-satisfaction. In the serious cases for which it was retained, the Code, as we shall see, suggests but does not enforce a composition. The details of this case and the minor ones of personal injury will be treated hereafter. But a few words must be said here on what is possibly the original meaning of the word poena as bearing on the right of vengeance.

Poena. In minor cases of injury treated by the Code we shall find it enacting the compulsory acceptance of certain fixed sums of money, which at the time meant a considerable sacrifice, as, or for, poena. It is, however, not at all clear that these were considered in the light of damages, any more than the ram which was to be tendered to the relatives of a man slain by misadventure (at least according to the view here taken of that tender).

In the Roman law of the formulary system, neither the death nor the disfigurement of a free man could be valued for damages under the lex Aquilia, though compensation was

²² Tab. 8. 2. See Muirhead2, p. 102, corrected by Goudy's note 12.

²⁴ Jhering⁵, i. pp. 133, 138: Cuq, i. p. iv. ²⁵ See Gellius, 20. 1. 34.

recovered indirectly for injury short of death under the head of services, or hire of services, lost and expense of medical attendance²⁶. The principle was that expressed in the maxim of Gaius, liberum corpus nullam recipit aestimationem²⁷. This perhaps held good also in the older time, so that the payments constituting the poena were rather the consideration fixed by the state for abstinence from private vengeance than the compensation for harm done.

The derivation, as well as the national provenance, of the word poena (of which that in the Twelve Tables appears to be our oldest instance), has been contested. The tendency of recent writers, on Roman criminal and semi-criminal law, has been to regard it as a loan word borrowed at some very early period from the Greek moivn, in the sense of any money penalty, the original root-meaning of the word being estimate or payment²⁸. The opinion, however, of one who is still one of our highest etymological authorities, which is moreover supported by Jhering, is that poena originally meant the purification, clearance or atonement of the offender²⁹, both poena and mouvn, whether directly or collaterally related to one another, coming from the common root of purus, putus, &c. and pointing properly and originally to a clearance of guilt towards heaven and liability to man. From the same root according to one explanation, and that not the least probable, comes pontifex30.

Whatever the provenance or the derivational meaning of the Latin word may be, it is clear that poena meant, to the

²⁶ Ulpian, Dig. 9. 2. 7. pr.

²⁷ Dig. 9. 3. 7, see also Ulpian, Dig. 9. 3. 1. 5.

²⁸ Karlowa, RRg. ii. p. 790: Mommsen, Str. p. 13: Leist, Gr.-Ital. Rg. pp. 389, 390: Cuq, i. p. 334, n. 3 (inconclusive): I find nothing in Brugmann.

²⁹ Corssen², i. p. 370 and Beit, p. 78: Jhering⁵, i. p. 277, nn. 181 and 181 b: Curtius⁵ is undecided, pp. 281, 472: for connexion with both vengeance and payment, &c. see Fick, Wörterb.³ i. pp. 140, 147, 533: cf. too Skeat, Etym. Dict. s.v. Pain.

⁸⁰ Above, § 13, p. 420. See too, generally, Jurisprudence, ii. pp. 674, 675.

end, something different from mere pecuniary compensation, and that the apparently contradictory statements about it can be reconciled only by taking into account the element of vindictive satisfaction as well as that of damages, even those which are sometimes called (from a misapprehension as to the sole object of punishment) exemplary³¹. This subject, however, can be treated thoroughly only when we come to consider in detail the actions rei vel poenae persequendae gratia comparatae under the formulary system.

Lampoon. There is an apparent private wrong, of a personal character, against which a penalty is enacted in general terms—lampoon³². This I think is correctly to be regarded as the imposition of a public penalty by the XII. But it is not impossible, from its extravagant and at the same time "characteristic" (see § 18, p. 587) form (cudgelling to death), that it replaced a previous private vengeance sanctioned as appropriate by public opinion.

Fur manifestus. With regard to offences against property there is one case in the Twelve Tables into which the old idea of self-help, by way of vengeance, has been supposed to enter—that of the thief caught in the act—by night in any case, by day if he defends himself with a weapon³³. But I regard this as a mere consequence of the right of private arrest (in itself indeed a form of self-help) and consider that the killing is justified on account of the danger incurred, not the indignation felt, by the owner.

Contracts. As to private wrongs arising from contractual or quasi-contractual obligation in the regal period a very few words may here be said. Early law is mostly the law of Delict Public or Private: and violation of Rights of Property, if considered in the latter light, will come most

⁸¹ Kenny, Outlines of Criminal Laws, p. 12.

Tab. 8. 1 and Cicero, de Rep. iv. Fragm. 10. 12.
 Tab. 8. 13: Cicero, pro Tullio, 20. 47, &c., &c.

properly under the head of Procedure (below, p. 620). Any definite recognition of obligation ex contractu, corresponding directly, in Austin's words, to jus in personam, belongs to a more developed stage than the regal period.

Informal agreements there must have been, in the nature of things, not unlike the later contracts. There clearly were early promises backed by a sort of divine sanction, which probably lost a good deal of its efficacy on the subordination of the religious to the secular power. Much weight, however, is attributed, by Roman writers at the end of the republic, to the prisca fides, the religious or social sanctions of these engagements. But it does not seem that we can point to any specific legal remedy until we come to the fiduciary employment of mancipation which does not appear to have been developed before the time of the XII. This undoubtedly provided a recognised legal bond in the case of mortgage and pledge, deposit and probably loan for use (commodatum). For loan proper (mutuum) there was clearly developed in the period between the time of Servius, or perhaps the beginning of the Republic, and the legislation of the Twelve Tables the remarkable contract of nexus, on which I shall speak more particularly hereafter. There is little doubt that stipulatio, or the recognition of sponsio as a legal contract, is later than the Twelve Tables. It is generally considered by good authorities to be a consequence of the lex Poetelia c. 326 B.C.

I have spoken of the rise of obligations re and verbis. The obligatio litteris and the specific obligations consensu probably did not come into existence until the latter half of the republican period.

If we look at the obligations quasi ex contractu mentioned in Justinian 3. 27, we shall see that the only ones at all likely to have existed in early times are those arising from family relations. The more serious breaches of duty in these relations were no doubt in theory criminally treated, and

subject to the usual severe sanction, appeal from which, when allowed, would permit of the offender's timely withdrawal into exile. Minor offences of the same character were considered matter of religious censure, but that sanction was not backed so much by any legal proceeding, as by gentile ostracism—a very serious punishment in early republican times.

The obligations quasi ex delicto are obviously, from our extant passages of the Edict, matter of late Praetorian law.

To delict belong, in Ground for real actions. principle, the wrongful detentions which give rise to real actions. These, however, differ materially from what is ordinarily meant by delict, in the fact that here an original right itself is contested as the subject-matter of action, not the infringement of an admitted original right, to security. It is possible that these cases were not very numerous in early Rome, for the reason alleged by Sir H. Maine³⁴ for infant communities in general, which is peculiarly applicable to Rome—the small number proportionately of persons between whom disputes as to property could arise. There could be neither offence nor contested claim between members of a family, as to property which is, in the eye of the law, exclusively owned by the head. Encroachments upon the family inheritance, as a whole, or its produce were apparently treated as sins

On the death of a paterfamilias, his then household succeeded to his property on principles roughly stated in § 4, pp. 105—112 which however soon required the regulation which appears in the XII (ib. p. 110). In cases, however, where there is no question of more distant succession or priority, but the sui of the first generation take alone, though a standing consortium may remain (§ 4, p. 108), on the other hand, a division of the property may be desirable, and pro-

ceedings for this purpose though attributed to the XII³⁵ no doubt belong to an older period and are in fact probably the earliest legal proceedings taken in Rome.

The actio familiae erciscundae was probably an amicable suit throughout, as it is obviously conceived in Lenel's reproduction under the formulary system³⁶. The difficulties of explaining the word ercisco and of reconciling that explanation with the phrase ercto non cito I must leave until I come to the Twelve Tables. At present I pass to some features of a non-amicable suit, a dispute as to property, which are evidently of the highest antiquity and illustrate both the principle of self-help and the general religious character of early Roman law. The preliminary forms of claim and counter-claim in Gaius' legis actio sacramenti are commonly considered to represent a fight or at any rate an assertion of conflicting rights by the strong hand³⁷. The sacramentum is clearly a means of replacing the rough arbitrament of battle by a sentence involving some degree of religious sanction. For it is incorrectly apprehended by Sir Henry Maine as a wager. The loser's deposit did not go to the winner, and the word itself is, on the wager theory, left unexplained. It was a mutual assertion, upon oath, of the justice of the conflicting claims, and the sacrifice of the loser's stake which went ultimately in publicum, poenae nomine, is most probably an expiation for perjury. As to the oath, and the amount of the deposit see Festus (F. p. 344, Sacramentum) and Gaius (4. 14). The money itself is called sacramentum by Varro³⁸

³⁸ Varro, L. L. 5. 180. Ea pecunia quae in judicium venit in litibus sacramentum a sacro. Qui petebat et qui inficiebatur de aliis rebus utrique

³⁵ Gaius, Dig. 10. 2. 1. pr. ³⁶ Lenel, Edictum², p. 201.

³⁷ Gaius, 4. 13—17. Maine, A. L. p. 374: Jhering⁵, i. p. 129. Plautus has repeated references to the causa liberalis. Gaius (4. 14) speaks of it as tried by sacramentum under the Twelve Tables, and the form of manumission vindicta in which this procedure is utilised is evidently extremely ancient. Karlowa, RRg. ii. p. 130.

in an interesting passage which, if it does not actually introduce the pontiff, suffices to prove the originally religious character and destination of the deposit. In the evidently early time to which we may refer the practice of sacramentum, we must remember that the king was still a pontiff, and had probably absorbed the functions of the pontiff proper. Festus in another article on Sacramentum (F. p. 347) has a lame story about the money being so called quod...consumebatur in rebus divinis. Whether it is devoted, or the litigant himself is, in case he swears falsely, I shall not waste time in enquiring³⁹.

Reference of private cases to private judices was, as we have seen⁴⁰ traditionally represented as one of Servius' diminutions of the royal prerogative. What is meant appears to be not the simple act of reference, which, if to Pontiffs or Patricians generally, would be little gain to the aggrieved Plebeian, but allowing the parties to choose their own judex, which is sometimes attributed to Gaius' lex Pinaria (G. 4. 15) and is certainly posterior to the establishment of the Republic⁴¹. But on the legis actiones I shall have to speak more fully when I come to deal with the Twelve Tables.

quingenos aeris ad pontem deponebant de aliis rebus item certo alio legitimo numero assum; qui judicio vicerat suum sacramentum e sacro auferebat, victi ad aerarium redibat. Of the words ad pontem there was an old emendation ac pontificam which Müller rejects, taking this to be merely a locus quidem sacer ad pontem sublicium.

³⁹ Danz treats this subject at great length, taking the latter view (in the case of a wilfully false claim), in his Sacrale Schutz. In the military sacramentum it is generally understood to be the oath of fidelity itself: in the original legal one, there seem to have been two elements, one, a statement on oath by the party of the justice of his claim, the other an invocation of the vengeance of heaven upon him in case his claim (strictly his oath) proved unjust.

^{46 § 16,} p. 538.

⁴¹ It is placed by Karlowa (RRg. i. p. 274, n. 2) in 472 B.C.

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